APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 05-16173, 05-16389, 05-16406,
05-16554. Adv. No. 98-2313-RCJ

VACATION VILLAGE, INC.,
Plaintiff-Appellee,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellant.

VACATION VILLAGE, INC.,
Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellee.

IN RE CEH PROPERTIES, LTD.,
Debtor,

VACATION VILLAGE, INC.,
Plaintiff-Appellee,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellant.

IN RE CEH PROPERTIES, LTD.,
Debtor,

VACATION VILLAGE, INC.,
Plaintiff-Appellant,

v.

CLARK COUNTY, NEVADA,
Defendant-Appellee.

Argued and Submitted April 16, 2007
Filed July 23, 2007
Amended Aug. 10, 2007

Appeal from the United States District Court for the District of Nevada; Robert C. Jones, District Judge, Presiding. D.C. No. CV-05-00010-RCJ.

Before WARREN J. FERGUSON, STEPHEN REINHARDT, and MILAN D. SMITH, JR., Circuit Judges.

ORDER AMENDING OPINION AND AMENDED OPINION

MILAN D. SMITH, JR., Circuit Judge:

ORDER

The opinion filed on July 23, 2007 at slip op. 8849 is hereby AMENDED as follows:

Delete the paragraph at slip op. 8861 beginning "The *Rooker-Feldman* doctrine holds that" and the paragraph at slip op. 8861-62 beginning "Here, the state court stated" and replace with:

> "The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.*,

> 544 U.S. 280, 284 (2005). Thus, *Rooker-Feldman* "applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief from the state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (emphasis in original). *See also Noel v. Hall*, 341 F.3d 1148, 1154-65 (9th Cir. 2003).

Here, the state court stated only that it *would* dismiss the case *if and when* the statute of limitations in Nevada Rule of Civil Procedure 41(e) expired. Neither the state court's observation that Rule 41(e) would require it to dismiss the case in a matter of days when the mandatory five-year deadline passed, nor the minute order reflecting the state court's unavailability for trial, is the equivalent of an actual order dismissing Landowners' action. Because there was no state court judgment from which the Landowners sought relief, *Rooker-Feldman* does not apply to bar federal jurisdiction over Landowners' claims.

Pursuant to General Order 5.3, this amendment does not affect current deadlines for filing a petition for rehearing or petition for rehearing en banc.

IT IS SO ORDERED.

OPINION

Appellees, the owners of real property near McCarran International Airport in Las Vegas, Nevada, brought an inverse condemnation action against Clark County (County) alleging that the County's Ordinances 1221 and 1198, which impose, respectively, height and use restrictions, constitute takings under the Nevada Constitution. We hold that our review of Ordinance 1221 is limited by the Nevada Supreme Court's decision in *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) construing Nevada state law, and, accordingly, find that Ordinance 1221, as applied to Appellee's property, amounts to a taking. We remand for a

calculation of just compensation in light of *Sisolak*. We affirm the district court's decision that Ordinance 1198 did not effect a taking of Appellee's property.[1]

I. BACKGROUND

For more than 50 years, the County has regulated land near McCarran Airport through the adoption of zoning ordinances. As a result of its proximity to the airport, the real property owned by Appellees (collectively, the Landowners)[2] has been encumbered by a number of these ordinances.

The Landowners acquired the subject property in 1964, intending to construct a hotel resort and casino. A portion of the property was zoned as Rural Estates Residential (R-E), and in 1971 the Landowners sought to rezone this portion as Limited Resort and Apartment (H-1). The County partially conditioned approval of the Landowners' rezoning request on the Landowners' granting of the following avigation easement:

> [The County] is to have a perpetual right of flight, ingress to and egress from the airspace over the lands herein above described, in conformity with the air traffic rules governing the flight of aircraft to and from the Clark County Airport. . . . It is further understood and agreed that the grantor himself, his heirs, successors or assignees . . . shall and do hereby release, and agree to save harmless and indemnify, the County of Clark from any claims whatsoever for losses caused by noise or the psychological effects of aircraft.

(First Easement). By 1974, the Landowners had completed a number of rooms, but not the entire building. The parties did

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[1] We address the remaining issues raised by both parties on appeal in a concurrently filed memorandum disposition.

[2] In ways not relevant to our decision, the ownership of the subject property has been transferred several times. For convenience, we use the term "Landowners" to refer to the then relevant fee holder(s) throughout this opinion.

not complete the rezoning and the First Easement was not recorded.

In February 1981, the County enacted Ordinance 728 at Chapter 29.50 of the Clark County Code in order to limit the height of structures adjacent to public use airports. Ordinance 728 set a height limitation demarcated by a plane sloping "twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface" for areas designated as a "Utility Runway Visual Approach Zone." The parties refer to this height limitation as a "20:1" slope surface. Ordinance 728 set a height limitation of one hundred fifty feet above the airport elevation for areas within a "Horizontal Zone."

In June 1988, the Landowners filed another rezoning request with the County to have the R-E property reclassified as H-1. The County conditioned its approval of the Landowners' rezoning request on the Landowners' granting the following avigation easement:

> It is understood and agreed that [the County is] to have perpetual right of flight, for the passage of aircraft in the air space above the surface of said premises, together with the right to cause in said air space such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air using said air space or landing at, or taking-off from or operating at, or on the premises known as McCarran International Airport. . . .
>
> It is further understood the GRANTOR does hereby agree for himself to release Clark County, Nevada, and operators and users of the above described airfields from any claims whatsoever for losses hereafter caused by noise or the psychological effects of aircraft noise resulting from the overflight of aircraft.

(Second Easement). The Landowners granted the Second Easement to the County on June 21, 1988. The County reclassified the property from R-E to H-1 and granted a use permit to the Landowners to construct and maintain a 501-room, two-story hotel, and an 85,000-square-foot casino. According to the Landowners, construction under the proposed design plans began in 1989.

On January 16, 1990, the Federal Aviation Administration (FAA) issued a "Determination of Hazard to Air Navigation" to the Landowners. The FAA determined that the Landowners' previously proposed 80-foot sign, 47-foot casino and three 76-foot hotel buildings would penetrate the approach slope for proposed Runway 1R and thus "would have a substantial adverse impact to the safe and efficient use of navigable airspace and would be a hazard to air navigation."

The Landowners redesigned the proposed construction limiting the height of the structures on the property to 38 feet above ground level 2,850 feet southwest of the approach end of Runway 1R. On June 27, 1990, the FAA issued a "Determination of No Hazard to Air Navigation" finding that "[a]lthough the structure has been identified as an obstruction, . . . the proposal would not adversely affect the safe and efficient use of navigable airspace and would not be a hazard to air navigation."

On July 18, 1990, the County passed Ordinance 1221 which amended Chapter 29.50 of the Clark County Code. For property in a "Precision Instrument Runway Approach Zone" the applicable height limitation "[s]lopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline." The parties refer to this height limitation as a "50:1" slope surface. Despite this height limitation, Ordinance 1221 provides that it should not be "construed as prohibiting the construction or maintenance of any structure to a height up to

thirty-five feet above the surface of the land in any zone." Ordinance 1221 also requires that before the construction of new buildings and structures in these zones, the FAA and the Clark County Department of Aviation must first determine that "it does not constitute a hazard."

The County also adopted Ordinance 1198 at Chapter 29.51 of the Clark County Code. Ordinance 1198 establishes an "airport environs overlay district." The stated purpose of the ordinance is "to provide for a range of uses compatible with airport accident hazard and noise exposure areas and to prohibit the development of incompatible uses that are detrimental to the public health, safety and welfare in these airport environs." As applied, Ordinance 1198 designates 1.25 acres of the Landowners' property as a runway protection zone (RPZ). Such designation limits the development of the 1.25-acre parcel to uses such as a parking lot, a water area, or landscaping.

On December 17, 1993, the Landowners filed a complaint in Nevada state court alleging, among other things, inverse condemnation of airspace and inverse condemnation of 1.25 acres in the RPZ. A jury trial was originally scheduled for March 11, 1996 but was continued to March 24, 1997 due to the Landowners' illness. At the Landowners' request, the state court set a new trial date of September 22, 1998.

On October 7, 1997, the Landowners filed a voluntary petition for bankruptcy under Chapter 11 in United States Bankruptcy Court for the District of Nevada and listed their inverse condemnation claims against the County as a contingent and unliquidated claim in their Schedule of Personal Property. The bankruptcy court confirmed the reorganization plan on November 24, 1998.

Meanwhile, in Nevada state court, the Landowners reported on September 23, 1998 that they were not ready to proceed with trial. No other trial dates were available before the expiration of the five-year limitations period for bringing

a case to trial under Nevada Rule of Civil Procedure 41(e). The state court denied the Landowners' request to "put on one witness, put on a little bit of testimony" to satisfy the rule, and stated that absent a waiver of the limitations period by the County, the case would be automatically dismissed when the limitations period ran under Rule 41(e).

The Landowners then filed a motion requesting that the period following October 7, 1997, when the bankruptcy petition was filed, not be counted in determining the five-year period for trial under Rule 41(e) because an "automatic stay" applied. The state court denied the Landowners' motion, finding that no automatic stay was in place.

The Landowners next sought relief in the bankruptcy court from the same alleged stay. The bankruptcy court judge, Judge Robert C. Jones, opined that he did not "think there's a stay in any event to lift," but nevertheless granted the Landowners' motion to lift "the stay." The Landowners thereupon removed their inverse condemnation claims to the bankruptcy court pursuant to 28 U.S.C. § 1452 and Rule 9027 of the Federal Rules of Bankruptcy Procedure. Following the County's motion for partial summary judgment, the Landowners filed a second amended complaint in which they continued to assert their inverse condemnation claims under the Nevada Constitution.

In April 2002, the case proceeded to a bench trial in the bankruptcy court before Judge Jones. Both parties consented to the entry of a final order or judgment by the bankruptcy judge. Judge Jones was subsequently confirmed as a federal district judge for the district of Nevada, and a year after his confirmation, he issued Findings of Fact and Conclusions of Law in this case that he signed as a "United States Bankruptcy Judge." Relevant to the issues discussed in this opinion, Judge Jones (1) awarded the Landowners compensation from the County for the taking of airspace as a result of Ordinance 1221; (2) determined that Ordinance 1198 did not re-

sult in a taking of the 1.25 acres in the RPZ; and (3) awarded the Landowners compensation from the County for the taking of certain ground easements.[3]

On January 4, 2005, Judge Jones, in his capacity as a district court judge, entered an order sua sponte withdrawing the bankruptcy reference. Judge Jones then entered a final judgment awarding the Landowners $10,121,686.63 in damages, fees, and prejudgment interest.

The County appealed and the Landowners cross-appealed.

II. GENERAL STANDARDS OF REVIEW

On appeal from a bankruptcy court's decision, we afford no deference to the prior decision of the district court. We review the bankruptcy court's conclusions of law de novo and the bankruptcy court's factual findings for clear error. Thus, "we accept findings of fact made by the bankruptcy court unless these findings leave the definite and firm conviction that a mistake has been committed by the bankruptcy judge." *In re Rains*, 428 F.3d 893, 900 (9th Cir. 2005) (quoting *Latman v. Burdette*, 366 F.3d 774, 781 (9th Cir. 2004)).

III. PRELIMINARY ISSUES

We first address a number of global challenges to the existence and exercise of jurisdiction in this case.

A. Rooker-Feldman

The County argues that the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine because any judgment rendered by that court "undercut the state

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[3] The final judgment includes a $287,781 award for the taking of certain ground easements plus prejudgment interest. The County does not appeal the district court's finding that there was a taking of the ground easements; the County only appeals the compensation award regarding the ground easements for (1) lack of subject matter jurisdiction and (2) excessive interest. We address the former argument in this opinion and the latter in the concurrently filed memorandum disposition.

court's ruling regarding dismissal, which was inextricably intertwined with the state law claims that the Landowners intended to pursue in the adversary proceeding." We disagree.

"The *Rooker-Feldman* doctrine . . . is confined to . . . cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus.*, 544 U.S. 280, 284 (2005). Thus, *Rooker-Feldman* "applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief from the state court judgment." *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (emphasis in original). *See also Noel v. Hall*, 341 F.3d 1148, 1154-65 (9th Cir. 2003).

Here, the state court stated only that it *would* dismiss the case *if and when* the statute of limitations in Nevada Rule of Civil Procedure 41(e) expired. Neither the state court's observation that Rule 41(e) would require it to dismiss the case in a matter of days when the mandatory five-year deadline passed, nor the minute order reflecting the state court's unavailability for trial, is the equivalent of an actual order dismissing Landowners' action. Because there was no state court judgment from which the Landowners sought relief, *Rooker-Feldman* does not apply to bar federal jurisdiction over Landowners' claims.

B. "Related to" Jurisdiction under § 1334(b)

The County also challenges whether subject matter jurisdiction over the case lies under 28 U.S.C. § 1334(b), which provides that federal courts shall have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to a case under title 11." In *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), the Supreme

Court described the scope of "related to" jurisdiction under § 1334(b):

> Proceedings "related to" the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate. . . . The first type of "related to" proceeding involves a claim like the state-law breach of contract action at issue in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

Id. at 307 n. 5 (internal citation omitted). Where the cause of action is not of the first type of proceeding identified in *Celotex*-owned by the debtor which becomes property of the estate in bankruptcy-courts are concerned with the closeness of the relationship between the proceeding and the bankruptcy estate. *See, e.g., Pacor Inc. v. Higgins*, 743 F.2d 984, 994 (1984) (holding that where the cause of action is between third parties, the test for "whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy" (emphasis omitted)), *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1193-94 (9th Cir. 2005) (adopting a more stringent test than applied in Pacor for a claim of the debtor that did not arise until after the confirmation of the bankruptcy plan).

Here, the Landowners' inverse condemnation suit falls squarely within the "first type of 'related to' proceeding" described in *Celotex*, 514 U.S. 307 n. 5, and is thus "related to" the bankruptcy within the meaning of § 1334(b) without further scrutiny. Similar to the claim before the court in Northern Pipeline, where the debtor filed a state action to recover contract damages to augment the debtor's estate, the debtors in this case seek to recover on state law inverse condemnation claims that are listed as property of the estate. *See Northern*

Pipeline, 458 U.S. at 55-56. The present suit is "related to" the bankruptcy because it is a part of the estate, and thus subject matter jurisdiction exists under § 1334(b).

C. Ripeness

"Ripeness is more than a mere procedural question; it is determinative of jurisdiction." *S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990). Under the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), an as-applied taking claim is ripe only if the landowner can establish that: (1) "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and (2) the landowner has sought "compensation through the procedures the State has provided for doing so." *Id.* at 186, 194. We conclude that both of the Landowners' claims are ripe under this standard.

Application of the first requirement in Williamson County (the "finality" requirement) is dependent on the nature of the taking. *See Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). As we explain below, we follow the Nevada Supreme Court's characterization of Ordinance 1221 as an "unconditional and permanent" taking and a "physical occupation of private property" under the Nevada Constitution. *See Sisolak*, 137 P.3d at 1123. For such takings, the ripeness analysis of *Williamson County* applies in a modified form-the first requirement, that the government entity reach a final decision regarding the application of the regulations to the property at issue, is "automatically satisfied at the time of the physical taking" because "[w]here there has been a physical invasion, the taking occurs at once, and nothing the city can do or say after that point will change that fact." *Daniel*, 288 F.3d at 382 (9th Cir.2002) (quoting *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n. 28 (9th Cir. 1986) (overruled on other grounds by *Yee v. City of Escondido*, 503

U.S. 519 (1992))). Thus, as to Ordinance 1221, the ripeness doctrine does not require the Landowners to first seek and be denied a variance to satisfy the finality requirement.

Ordinance 1198 is not a physical taking, so we must apply an unmodified form of the *Williamson County* finality requirement. *Cf. Daniel*, 288 F.3d at 382. Clarifying the first prong of *Williamson County*, the Supreme Court held that "once it becomes clear that . . . the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001). Thus, in applying the finality requirement for ripeness, courts have imposed a "meaningful application requirement," which requires that "local decision-makers must be given an opportunity to review at least one reasonable development proposal before an as applied challenge to a land use regulation will be considered ripe." *S. Pac. Transp. Co.*, 922 F.2d at 503. This requirement applies "even in instances where a regulation appeared on its face to be highly restrictive." *Id.*

After reviewing the record, Judge Jones found that the Landowners met the meaningful application requirement. In particular, he noted:

> Examining the recent use applications involving the 1.25 acres reveals that Vacation Village has requested to use that land for activities ranging from hotel development to a temporary automobile sales show. Vacation Village received approval for all of these uses. However, the approvals provided that none of the proposed activities could occur on the 1.25 acres.

We do not find that Judge Jones clearly erred in making these findings of fact. Based on the reasonable plans for "hotel development" and "temporary automobile sales show" which were denied as to the 1.25 acres in the RPZ, along with the clearly enumerated uses for land in an RPZ in Ordinance

1198, the Landowners have satisfied the *Williamson County* finality requirement as to Ordinance 1198.

The second requirement of *Williamson County* is also referred to as the "exhaustion" prong. *Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824, 827 (9th Cir. 2004). In *Carson Harbor Village*, the property owner alleged that, as applied to its property, the city's ordinance enacting a ceiling on rent levels for mobile home spaces amounted to a regulatory taking. *Id.* at 825-26. Instead of pursuing California's procedures for seeking just compensation, however, the property owner filed a complaint in federal district court alleging a taking under 42 U.S.C. § 1983. *Id.* at 826. Applying the second prong of *Williamson County*, we dismissed the property owner's regulatory takings claim as unripe. *Id.* at 830.

Unlike the § 1983 claim in *Carson Harbor Village*, the Landowners' inverse condemnation claims meet the exhaustion prong of *Williamson County*. In Nevada, an acceptable state procedure for obtaining just compensation for a takings claim is the filing of an inverse condemnation lawsuit. *See, e.g., Sisolak*, 137 P.3d at 1116. The Landowners initially brought their state law inverse condemnation claims in state court. That the case is presently in federal court is a product of 28 U.S.C. § 1334(b), not a failure to meet the ripeness requirement of *Williamson County*; the nature of the Landowners' state law inverse condemnation claims are not changed by the exercise of federal subject matter jurisdiction. As the Landowners are currently pursuing their state law inverse condemnation action, we find that the exhaustion prong of *Williamson County* is met as to both claims.

Because the Landowners' claims satisfy both of *Williamson County's* requirements—finality and exhaustion—we hold that they are ripe for adjudication.

D. Compliance with State Appeal Procedures

The Landowners argue that we should dismiss the County's appeal because it did not comply with N.R.S. § 37.170(1) which requires that in a takings case a government agency must first deposit into court the full amount of the judgment before it may dispute a money judgment on appeal. *See State ex rel. Dep't of Highways v. 2d Jud. Dist. Ct.*, 337 P.2d 274, 276 (Nev. 1959). Federal Rule of Civil Procedure 62(d), however, requires only that the appellant post a supersedeas bond in order to obtain a stay on appeal. We apply the Federal Rule.

"[F]ederal courts are to apply state substantive law and federal procedural law." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965). Thus, "[w]hen a situation is covered by one of the Federal Rules [of Civil Procedure] . . . the court has been instructed to apply the Federal Rule," even it "is in direct collision with the law of the relevant State." *Id.* at 471-72. Rule 62(d) "is a purely procedural mechanism to preserve the status quo during a stay pending appeal of a district court decision and creates no choice of law concerns." *Bass v. 1st Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000). The County's monetary obligations on appeal is a situation "covered by" Rule 62(d). We apply Rule 62(d) and find that the County properly complied by posting a supersedeas bond.

E. Dual Role of Judge Jones

A year after his confirmation to the United States District Court for the District of Nevada, Judge Jones issued Findings of Fact and Conclusions of Law, which he signed as a "United States Bankruptcy Judge." Soon thereafter, acting in his capacity as a district judge, Judge Jones entered an order sua sponte withdrawing the bankruptcy reference for reasons of judicial efficiency, and entered a final judgment. We hold that the unique procedural history of this case does not require reversal.

The County cites no authority for the proposition that Judge Jones's entering of findings of fact signed as a bankruptcy judge following his confirmation as an Article III judge constituted reversible error. In *Northern Pipeline*, on which the County's opening brief primarily relies, the Supreme Court was concerned with the opposite problem-the potential for a violation of the separation of powers doctrine when the "judicial Power of the United States" is bestowed on Article I bankruptcy judges, who lack the salary and tenure protections of Article III. 458 U.S. at 58-60. Judge Jones was an Article III judge, with all of the attendant benefits and protections when he entered his findings. Absent a reasoned argument for concern, we do not find that reversal is warranted on these facts.

Similarly, we do not find that Judge Jones's withdrawal of reference to the bankruptcy court was reversible error. Under 28 U.S.C. § 157(d), "[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion . . . for cause shown." In determining whether cause exists, we consider the following: "the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, the prevention of forum shopping, and other related factors." *In re Cantor*, 299 F.3d 1150, 1154 (9th Cir. 2002) (quoting *Sec. Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen, & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997)). Judge Jones explained that "it is necessary and appropriate to withdraw the reference to the United States District Court of this adversary proceeding in order to allow the undersigned to file a final judgment." We find that Judge Jones efficiently used judicial resources and minimized further delay and costs to the parties by entering final judgment at the conclusion of protracted litigation. Thus, although there may have been some abrogation of the County's right to an intermediate appeal from the bankruptcy court's decision based on the precise timing of Judge Jones's withdrawal of the reference,

see, e.g., In re Pruitt, 910 F.2d 1160, 1168 (9th Cir. 2002), we find that an examination of all the factors identified in *In re Cantor*, 299 F.3d at 1154, indicates that Judge Jones properly withdrew the reference for cause.

IV. ORDINANCE 1221

Our review of the Landowners' claim that Ordinance 1221 effected a taking of airspace under the Nevada Constitution is limited by the Nevada Supreme Court's decision in *McCarran International Airport v. Sisolak*, 137 P.3d 1110, issued after the close of briefing in this appeal. Like the Landowners, Sisolak also owned property near McCarran Airport and brought an inverse condemnation action against the County alleging that the height restrictions in Ordinance 1221 constituted a per se regulatory taking under the Nevada Constitution. *Id.* at 1116. Citing the Nevada constitution and statutes, the Nevada Supreme Court first held that Sisolak had a valid property interest in the airspace above their land up to 500 feet. *Id.* at 1120. The court then reasoned:

> Although the airplanes flying over Sisolak's property are not constantly occupying the airspace in a temporal sense, the invasion is nevertheless permanent because the right to fly through the airspace is preserved by the Ordinances and expected to continue into the future. . . . Therefore, the Ordinances authorize a physical invasion of Sisolak's property and require Sisolak to acquiesce to a permanent physical invasion.

Id. at 1225. Based on its finding that Ordinance 1221 was a physical invasion of Sisolak's airspace, the Nevada Supreme Court concluded that "under both the United States and Nevada Constitutions, the facts of this case present a regulatory per se taking and that Sisolak is due just compensation for the government's physical invasion of his property." *Id.* at 1121. Given the similarities between *Sisolak* and the present

case, we first determine the proper weight to accord to the Nevada Supreme Court's decision in *Sisolak*.

As a general rule, "state law as announced by the highest court of the State is to be followed." *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). However, "interpretation of state statutes by state courts under compulsion of federal law erroneously understood does not bind federal courts." *Breisch v. Cent. R.R.*, 312 U.S. 484, 489 (1941).

We respectfully disagree with our colleagues on the Nevada Supreme Court concerning their interpretation of federal takings jurisprudence. No Fifth Amendment taking of the Landowners' property occurred under the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

The Landowners, however, raise inverse condemnation claims only under Article 1, Section 8(6) of the Nevada Constitution and under the circumstances of this case, the Nevada Supreme Court is the final arbiter of that fundamental state charter. Despite our disagreement with the Nevada Supreme Court's interpretation of federal takings cases, we cannot find that it felt compelled to interpret the Nevada Constitution in a particular manner based on those cases. *Cf. Delaware v. Prouse*, 440 U.S. 648, 651-53 (1979). The Nevada Supreme Court considered and rejected the argument that Sisolak's state constitution takings claim should be analyzed under *Penn Central*, noting that "a state may place stricter standards on its exercise of the takings power through its state constitution or state eminent domain statutes." 137 P.3d at 1126 (citing *Kelo v. City of New London*, 545 U.S. 469, 489 (2003)). In holding that Ordinance 1221 effected a taking, the majority in *Sisolak* cited to the Nevada Constitution and state statutes, as well as the decisions of other state supreme courts. *See, e.g.*, 137 P.3d at 1120, 1125. Jus-

tice Becker's dissent in *Sisolak* also confirms that the Nevada Supreme Court's decision was made on state grounds:

> I realize that the majority has determined to apply state constitutional principles to this takings analysis. This is certainly a reasonable approach. Having said this, I do not believe it necessary to deviate from federal takings jurisprudence to justly evaluate whether a compensable regulatory taking has occurred.

Id. at 1136 (Becker, J., dissenting). Thus, the Nevada Supreme Court clearly found that the Nevada Constitution defines takings more broadly than the United States Constitution and that Ordinance 1221 is a per se regulatory taking under the Nevada Constitution.[4]

We further find that we are bound by the Nevada Supreme Court's decision in *Sisolak* when reviewing Ordinance 1221 under the Nevada Constitution despite the existence of federal aviation regulations. Applying the Supreme Court's decision in *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 493-94 (1965), we hold that federal airport regulations do not preempt *Sisolak's* application of the Nevada Constitution's takings clause with respect to Ordinance 1221.

In *Jankovich*, the operators of the Gary Municipal Airport filed a complaint in Indiana state court alleging violations of

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[4] *Sisolak*, does not, however control the outcome of this case under principles of collateral estoppel. As a rule we "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Because Nevada courts have not applied offensive nonmutual collateral estoppel against a state party on a question of law, we do not apply it here. *See Coeur D'Alene Tribe v. Hammond*, 384 F.3d 674, 689 (9th Cir. 2004) ("[w]e hesitate to give preclusive effect to the previous litigation of a question of law by estoppel against a state party when no state law precedent compels that we do so"); Restatement (Second) of Judgments § 29 (1982).

the city's airport zoning ordinance which set height limitations for structures in the immediate vicinity of the airport. *Id.* at 488. The Indiana Supreme Court invalidated the ordinance, holding that such a restriction "purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." *Id.* The Supreme Court initially granted review of the Indiana Supreme Court's decision and then dismissed the writ of certiorari as improvedently granted, reasoning that it did not have jurisdiction over a decision of the Indiana Supreme Court made on independent and adequate state grounds. *Id.* at 489.

Relevant to the present case, the petitioners in *Jankovich* contended that the Indiana Supreme Court's "state ground of decision is not adequate because it is inconsistent with the policy of the Federal Airport Act . . . and therefore founders on the Supremacy Clause." *Id.* at 492. The Supreme Court rejected this argument, noting that the decision of the Indiana Supreme Court "certainly does not portend the wholesale invalidation of all airport zoning laws," *id.* at 493, and the Indiana Supreme Court's decision that the city's ordinance was invalid as a taking was "compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 495.

The County cites no subsequent Supreme Court authority which would call the holding of *Jankovich* into question. As the Supreme Court has already spoken on a substantially similar issue, we likewise hold that the Supremacy Clause does not invalidate the decision of the Nevada Supreme Court finding that height restrictions in airport zoning ordinances amount to a taking of the underlying property requiring compensation under the Nevada Constitution.

We now turn to the County's challenges specific to Ordinance 1221.

A. Constitutional Estoppel

The County also argues that the Landowners are constitutionally estopped from claiming a taking of their airspace. Based on the Nevada Supreme Court's decision in *City of Las Vegas Downtown Redevelopment Agency v. Pappas*, 76 P.3d 1 (Nev. 2003), we find that the Nevada Supreme Court would not find that the Landowners have waived their claims under the Nevada Constitution.

In *Pappas*, the Nevada Supreme Court declined to apply the doctrine of constitutional waiver, but held that the doctrine would apply to all eminent domain cases filed in the *future* (post-2003). *Id.* at 9. We believe that the Nevada Supreme Court would find that the holding of *Pappas* pertains to the present case because "[i]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings." *County of Clark v. Alper*, 685 P.2d 943, 949 (Nev. 1984). The Landowners filed their inverse condemnation complaint in 1993, ten years before the *Pappas* ruling. Thus under *Pappas*, the Landowners' claims are not constitutionally estopped.

B. Waiver by Easement

The County argues that by granting it perpetual avigation easements, the Landowners effectively transferred their property interest in the airspace and, therefore, cannot now bring a claim alleging a taking of that airspace. This argument also fails under *Sisolak*.

The interpretation of the language of an easement is a matter of state law. See *S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 246 (Nev. 2001). This court is bound by the Nevada Supreme Court's interpretation of the perpetual avigation easement involved in *Sisolak*, insofar as it does not conflict with federal law, because the avigation easement

language at issue in this case is identical to the language considered in *Sisolak*. *See Sisolak*, 137 P.3d at 1115-16.

The *Sisolak* court explained that "an easement obtained by a government entity for public use is only as broad as necessary for the accomplishment of the public purpose for which the easement was obtained." *Id.* at 1120 (quoting *S.O.C., Inc.*, 23 P.3d at 247). Noting that the avigation easement did "not contain any height restriction terms," the court held that the easement "did not abrogate Sisolak's property interest in the airspace or serve as a defense to the inverse condemnation claim." *Id.* Under Nevada law, the agreement was nothing more than an "overflight easement exacted . . . to preclude liability for aircraft noise." *Id.* at 1120-21. Following Sisolak, we hold that the avigation easements are not a defense to the taking of the Landowners' airspace.

C. Just Compensation for Airspace

The district court's conclusion that the taking of airspace by Ordinance 1221 was capped at the heights provided in Ordinance 728 was predicated on its erroneous interpretation—in light of *Sisolak*—of an avigation easement as waiving or conveying the Landowners' property interests for the airspace above a 20:1 approach path extending from the end of the runway. As discussed above, *Sisolak* holds that Nevadans have a property interest "in the usable airspace above [their] property up to 500 feet" notwithstanding the avigation easements granted. *Sisolak*, 137 P .3d at 1120. We thus remand to the district court for a determination of just compensation following *Sisolak*.

To determine just compensation for a taking of airspace by Ordinance 1221, *Sisolak* instructs:

> Constitutional principles provide that just compensation is measured by the fair market value of the condemned property. [T]he market value of the property should be

> determined by reference to the highest and best use for which the land is available and for which it is plainly adaptable. However, the highest and best use must be "reasonably probable." In determining fair market value, the trier of fact may consider any elements that fairly enter into the question of value which a reasonable businessman would consider when purchasing.

Id. at 1128 (internal quotation marks and citations omitted). On remand, the district court "should give 'due consideration . . . to those zoning ordinances that would be taken into account by a prudent and willing buyer.'" *City of Las Vegas v. Bustos*, 75 P.3d 351, 352 (Nev. 2003) (per curiam) (quoting *Clark County v. Alper*, 685 P.2d 943, 948 (1984) (ellipses in *Bustos*)).[5]

V. ORDINANCE 1198

Under *Sisolak*, Ordinance 1198 does not effect a regulatory per se taking under the Nevada Constitution of the separate parcel consisting of 1.25 acres. Outside the "two relatively narrow categories" of regulatory per se takings-where the regulation (1) requires an owner to suffer a permanent physical invasion of her property or (2) completely deprives an owner of all economical beneficial use of her property—"regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Sisolak*, 137 P.3d at 1122 (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)). The

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[5] For example, the Nevada Supreme Court has "permitted the trier of fact to consider the effect that future zoning or variances may have on the condemned property's highest and best use when there is evidence that a prudent purchaser would conclude that he or she would likely receive a zoning change." *City of N. Las Vegas v. Robinson*, 134 P.2d 705, 708 (Nev. 2006). *See also Sisolak*, 137 P.3d at 1128 ("Although evidence regarding variance procedures is irrelevant to establish whether a property owner is entitled to compensation for a regulatory per se taking, such evidence is still relevant in calculating the amount of compensation due.").

Landowners do not set forth a claim that Ordinance 1198 amounts to a regulatory per se taking because they do not allege that the designation of the 1.25 acres in question as within the RPZ constitutes either a permanent physical invasion or a complete deprivation of all economically beneficial use of that property.

When presented with a regulatory taking that is not a per se taking, the Nevada Supreme Court instructs that "[a] court should consider (1) the regulation's economic impact on the property owner, (2) the regulation's interference with investment-backed expectations, and (3) the character of the government action." *Sisolak*, 137 P.3d at 1122 (quoting *Penn Central*, 438 U.S. at 124).

In this case, Judge Jones evaluated the facts presented and properly applied the *Penn Central* test to the Landowners' inverse condemnation claim as it relates to Ordinance 1198. In particular, Judge Jones found that (1) the economic impact on the Landowners was minimal because the property in the RPZ accounted for only 5% of the Landowners' property, and that that small portion "could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot," (2) interference with reasonable investment backed expectations was also minimal because the regulation furthers an important public policy of airline safety and because the initial development of the airport predated the acquisition of the Vacation Village property, and (3) the character of the government action favors the County because airport zoning benefits the public as a whole. These factual findings are not clearly erroneous. Accordingly, we affirm Judge Jones's determination that Ordinance 1198 as applied to 1.25 acres of the Landowners' land designated as within the RPZ was not a taking.

VI. CONCLUSION

Following *Sisolak*, and in the absence of federal pre-emption, we have no choice but to find that Ordinance 1221, as applied to the Landowners' property, amounted to a regulatory per se taking under the Nevada Constitution. We remand the district court's award of just compensation for reconsideration in light of *Sisolak*.

We affirm the district court's decision that Ordinance 1198, as applied to the small parcel that is part of the Landowners' property, did not amount to a taking.

The parties shall each bear their own costs on appeal.

AFFIRMED IN PART and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed July 7, 2005]

Case No. CV-S-05-0011-RCJ-RJJ
Reference withdrawn from:
BK-S-97-27654-RCJ
Adv. No. 98-2313-RCJ

In Re: CEH PROPERTIES, LTD.,
Debtor.

VACATION VILLAGE, INC. d/b/a VACATION VILLAGE HOTEL & CASINO, *et al*,
Plaintiffs,

vs.

CLARK COUNTY, NEVADA, a public entity organized and existing under the laws of the State of Nevada, *et al.*,
Defendants.

Date of Hearing: N/A
Time of Hearing: N/A

AMENDED FINAL JUDGMENT AND ORDER IN CONDEMNATION

The bench trial in this action commenced on April 3, 2002. On December 30, 2005 the Court issued its findings of fact and conclusions of law ordering that Plaintiff Vacation Village, Inc., which reference is hereby corrected to CEH Properties, Ltd. ("CEH"), be awarded compensation by Defendant Clark County, Nevada ("Clark County"), for the taking of airspace between the 20:1 approach granted in the 1988 avi-

gation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion. The Court further ordered that CEH be awarded compensation by Clark County for the taking of the ground easement. The Court further ordered that Clark County did not take CEH's 1.25 acres in the runway protection zone.

On February 7, 2005, the Court further ordered that CEH's property had a before condition value of $10.00 per square foot and after condition value of $5.50. Therefore, the total value of the airspace taken would be the difference ($4.50 per square foot) times the total square footage of the property, 1,085,-951.00, or $4,886,779.50. The Court further ordered that the ground easement is to be valued at 30% of the total square footage for the easement (95,927 square feet) valued at $10.00 per square foot or $287,781.00. The total value of the take being $5,174,560.50 ($4,886,779.50 1 + $287,781.00).

On April 18, 2005, the parties presented, by briefing and argument, certain issues to this Court for determination. After considering the foregoing and for good cause appearing, the Court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. A final judgment and order in condemnation for the taking of the airspace and ground easement that were the subject of this litigation shall be and is hereby entered under CEH's five causes of action in its Second Amended Complaint. All claims by the other Plaintiffs are dismissed. The final judgment in inverse condemnation for just compensation is entered against Clark County in favor of CEH. The airspace taken by inverse condemnation is between the 20:1 approach and the lower 50:1 precision instrument approach path instituted after the airport expansion, over the property formerly referred to as Vacation Village Hotel and Casino, Assessors Parcel Number 177-05-602-001, and the ground

easement recorded as document number 891120:00778, and more particularly described in Exhibit "1", are hereby taken by inverse condemnation by Clark County.

2. CEH is entitled, to just compensation for the taking of said airspace by inverse condemnation in the amount of $4,886,779.50.

3. CEH is entitled to just compensation for the taking of said ground easement by inverse condemnation in the amount of $287,781.00.

4. CEH is entitled to prejudgment interest on the amount ordered in the final judgment and order of condemnation for both the airspace and the ground easement, from December 17, 1993, until final judgment and order of condemnation is entered on the total amount of $5,174,560.50. Interest will be calculated based on the statutory interest rate set forth in NRS 37.175, which is a rate equal to the prime rate at the largest bank in Nevada as ascertained by the commissioner of financial institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied. As of June 17, 2005, CEH is entitled to prejudgment interest commending December 17, 1993, in the amount of $4,314,803.73, and accruing thereafter at a rate of $1,027.82 per day, until the rate is adjusted on July 1, 2005 and every January 1 or July 1 thereafter until the judgment is paid in full, pursuant to NRS 37.175.

5. CEH is entitled to $7,322.40 in costs in this case.

6. CEH is entitled to appraiser's fees for Charles H. Jack, IV, in the amount of $25,000.00.

7. CEH is entitled to attorney's fees in the amount of $600,000.00.

8. As of June 17, 2005, the total final judgment including all costs, appraiser fees, attorney's fees and pre-judgment interest is $10,121,686.63.

9. Post-judgment interest shall accrue on all unpaid amounts for the takings, costs, appraiser's fees and attorney's fees at the statutory rate set forth in NRS 37.175.

10. Clark County must pay the total amount to be due within thirty (30) days of the entry of this Final Judgment and Order of Condemnation by depositing said amount with the Clerk of the Court or by posting a cash bond in the amount of 110% of the total judgment or by posting a supersedeas bond in the amount of 120% of the total judgment or by posting a supersedeas bond in the amount of 120% of that part of the final judgment that Clark County intends to challenge on appeal.

11. Within 30 days after the final judgment is entered, Clark County may elect to pay to CEH the sum of $287,781.00, the amount determined to be the value of the ground easement, plus all accrued pre-judgment interest in the amount of $240,709.10 through June 17, 2005, totaling $528,490.10 plus additional interest accruing at $57.16 per day through June 30, 2005, until paid in full, and adjusted thereafter to the statutory rate as of July 1, 2005 and upon payment to the Clerk of the Court, title will vest ownership of the ground easement, identified in Exhibit "1," in Clark County.

12. If Clark County elects to pay for the ground easement as set forth in Paragraph 8, the remaining final judgment will be $9,593,939.64 as of June 17, 2005, with interest accruing on the principal value of the airspace at the rate of $1,027.82 per day until the bond is posted. To stay execution of the remaining final judgment pending appeal, Clark County will be required to post a cash bond in the amount of 110% of the remaining final judgment or a supersedeas bond in the amount of 120% of the remaining judgment.

13. Upon the entry of final judgment and order of condemnation, and pending an appeal by either party, Clark County may continue in possession and use of the property during the pendency of and until the final conclusion of this litigation and any appeal. Clark County shall not be deemed to have abandoned or waived its right to appeal from the final judgment and order of condemnation by paying into this court the amount of this final judgment or by filing a cash or supersedeas bond with the Clerk of the Court in an amount set forth by the Court.

14. The Parties having reviewed this final judgment and order of condemnation do not waive their respective rights on appeal as to any issue that may have arisen during this litigation.

IT IS SO ORDERED this 7th day of July, 2005.

/s/ Robert C. Jones
UNITED STATES DISTRICT COURT JUDGE

Reviewed by:

JOHN PETER LEE, LTD.
/s/ John Peter Lee
JOHN PETER LEE, ESQ.
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Reviewed by

JONES. VARGAS
/s/ R. Douglas Kurdzeil
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Attorney for Clark County

Attorneys for: CEH Properties, Ltd;
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Cathleen Heers Norcott; Gary R. Heers; and Cheryl D. Nolte

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

[Filed JUN. 17, 2005]

Case No. CV-S-05-0010-RCJ-RJJ

In re: CEH PROPERTIES, LTD.,
Debtor.

VACATION VILLAGE, INC. d/b/a
VACATION VILLAGE HOTEL & CASINO, *et al.*,
Plaintiffs,

vs.

CLARK COUNTY, NEVADA, a public entity organized and existing under the laws of the State of Nevada, *et al.*,
Defendants.

FINAL JUDGMENT AND ORDER IN CONDEMNATION

The bench trial in this action commenced on April 3, 2002. On December 30, 2005, the court issued its findings of fact and conclusions of law ordering that Plaintiff Vacation Village, Inc., which reference is hereby corrected to CEH Properties, Ltd. ("CEH"), be awarded compensation by Defendant Clark County, Nevada ("Clark County"), for the taking of airspace between the 20:1 approach granted in the 1988 avigation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion. The court further ordered that CEH be awarded compensation by Clark County for the taking of the ground easement. The court further ordered that Clark County did not take CEH's 1.25 acres in the runway protection zone.

On February 7, 2005, the court further ordered that CEH's property had a before condition value of $10.00 per square foot and after condition value of $5.50. Therefore, the total value of the airspace taken would be the difference ($4.50 per square foot) times the total square footage of the property, 1,085,951.00, or $4,886,779.50. The court further ordered that the ground easement is to be valued at 30% of the total square footage for the easement (95,927 square feet) valued at $10.00 per square foot or $287,781.00. The total value of the take being $5,174,560.50 ($4,886,779.50 + $287,781.00).

On April 18, 2005, the parties presented, by briefing and argument, certain issues to this court for determination. After considering the foregoing and for good cause appearing, the court rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. A final judgment and order in condemnation for the taking of the airspace and ground easement that were the subject of this litigation shall be and is hereby entered under CEH's five causes of action in its Second Amended Complaint. All claims by the other Plaintiffs are dismissed. The final judgment in inverse condemnation for just compensation is entered against Clark County and in favor of CEH. The airspace taken by inverse condemnation is between the 20:1 approach and the lower 50:1 precision instrument approach path instituted after the airport expansion, over the property formerly referred to as Vacation Village Hotel and Casino, Assessors Parcel Number 177-05-602-001 and the ground easement recorded as document number 891120:00778, and more particularly described in Exhibit 1, are hereby taken by inverse condemnation by Clark County.

2. CEH is entitled to just compensation for the taking of said airspace by inverse condemnation in the amount of $4,886,779.50.

3. CEH is entitled to just compensation for the taking of said ground casement by inverse condemnation in the amount of $287,781.00.

4. CEH is entitled to prejudgment interest on the amount ordered in the final judgment and order of condemnation for both the airspace and the ground easement, from December 17, 1993, until final judgment and order of condemnation is entered on the total amount of $5,174,560.50. Interest will be calculated based on the statutory interest rate set forth in NRS 37.175, which is a rate equal to the prime rate at the largest bank in Nevada as ascertained by the commissioner of financial institutions on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied. As of June 17, 2005, CEH is entitled to prejudgment interest commencing December 17, 1993, in the amount of $4,314,803.73, and accruing thereafter at a rate of $1,027.82 per day, until the rate is adjusted on July 1, 2005 and every January 1 or July 1 thereafter until the judgment is paid in full, pursuant to NRS 37.175.

5. CEH is entitled to $7,322.40 in costs in this case.

6. CEH is entitled to appraiser's fees for Charles H. Jack, IV, in the amount of $25,000.

7. CEH is entitled to attorney's fees in the amount of $600,000.00.

8. As of June 17, 2005, the total final judgment including all costs, appraiser fees, attorney's fees and prejudgment interest is $10,121,686.63.

9. Post-judgment interest shall accrue on all unpaid amounts for the takings, costs, appraiser's fees and attorney's fees at the statutory rate set forth in NRS 37.175.

10. Clark County must pay the total amount to be due within thirty (30) days of the entry of this Final Judgment and Order of Condemnation by depositing said amount with the Clerk of the Court or by posting a cash bond in the amount of 110% of the total judgment or by posting a supersedeas bond in the amount of 120% of the total judgment or by posting a supersedeas bond in the amount of 120% of that part of the final judgment that Clark County intends to challenge on appeal.

11. Within 30 days after the final judgment is entered, Clark County may elect to pay to CEH the sum of $287,781.00, the amount determined to be the value of the ground easement, plus all accrued pre-judgment interest in the amount of $240,709.10 through June 17, 2005, totaling $528,490.10 plus additional interest accruing at $57.16 per day through June 30, 2005, until paid in full, and adjusted thereafter to the statutory rate as of July 1, 2005, and upon payment to the Clerk of the Court, title will vest ownership of the ground easement, identified in Exhibit 1, in Clark County.

12. If Clark County elects to pay for the ground easement as set forth in Paragraph 8, The remaining final judgment will be $9,593,939.64 as of June 17, 2005, with interest accruing on the principal value of the airspace at the rate of $1,027,82 per day until the bond is posted. To stay execution of the remaining final judgment pending appeal, Clark County will be required to post a cash bond in the amount of 110% of the remaining final judgment or a supersedeas bond in the amount of 120% of the remaining judgment.

13. Upon the entry of the final judgment and order of condemnation, and pending an appeal by either party, Clark County may continue in possession and use of the property during the pendency of and until the final conclusion of this litigation and any appeal. Clark County shall not be deemed to have abandoned or waived its right to appeal from the final judgment and order of condemnation by paying into this court

the amount of this final judgment or by filing a cash or supersedeas bond with the Clerk of the Court in an amount set forth by the court.

14. The Parties having reviewed this final judgment and order of condemnation do not waive their respective rights on appeal as to any issue that may have arisen during this litigation.

DATED: June 17, 2005

/s/ Robert C. Jones
UNITED STATES DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

[Filed DEC. 30, 2004]

BK-S-97-27654-RCJ
Chapter 11
Adversary No. 98-2313-RCJ

In re: CEH PROPERTIES, LTD,

Debtor.

VACATION VILLAGE, INC. d/b/a VACATION VILLAGE HOTEL & CASINO, *et al.*,

Plaintiffs,

CLARK COUNTY, NEVADA, a public entity organized and existing under the laws of the State of Nevada, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Date:
Time:

Plaintiff, Vacation Village, Inc., (hereinafter "Vacation Village") is a casino and hotel located along Las Vegas Boulevard South, a portion of which is commonly referred to as the Las Vegas "Strip." The property is also located approximately 2,600 feet from the end of two of McCarran International Airport's (hereinafter "airport") large aircraft runways. Vacation Village brought suit against Defendant, Clark County, Nevada, (hereinafter "County") for damages arising from the 1) inverse condemnation of airspace, 2) inverse condemnation of 1.25 acres, and 3) inverse

condemnation of easements.[1] This suit was originally brought in the District Court for Clark County. The case was removed to this Court, as a non-core adversary proceeding, after the Vacation Village property owner filed for bankruptcy. The Court having received oral and documentary evidence introduced by the parties at trial, and having duly considered said evidence and the points of law and authorities cited in the trial briefs of the parties, now finds for the reasons hereinafter set forth that the County is liable for the inverse condemnation of airspace and for the inverse condemnation of easements.

The following constitutes the Court's findings of fact and conclusions of law. To the extent certain findings may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent matters contained in the conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

I. FINDINGS OF FACT

In 1964, the Vacation Village property was purchased by Twin Lake Village, Inc. (hereinafter "Twin Lake"), the principals of which were Carol Heers and his brother Charles Heers. Twin Lake had assembled a 59 plus acre parcel of land located along the west side of Las Vegas Boulevard South. The Vacation Village property made up the northern portion of this parcel. Twin Lake transferred ownership of the parcel to the Heers brothers as individuals in 1971.

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[1] Plaintiffs amended their initial Complaint twice, reducing the causes of action from eleven to five. Plaintiffs' Second Amended Complaint included a cause of action for pre-condemnation damages along with the claims for inverse condemnation. However, in oral arguments Plaintiffs' counsel stated they were not seeking damages for the loss of business or having to lower the building plans and get air conditioners from Israel. Therefore, the Court does not address the fifth cause of action in Plaintiffs' Second Amended Complaint.

In 1973, as a result of litigation in a bankruptcy proceeding, the southern 34.40 acres of the parcel were transferred to Transamerica Corporation, and Carol Heers retained ownership of the northern 24.90 acres, along with a 30-foot easement across the Transamerica property. In 1988 Carol Heers, his wife, their children, and grandchildren created CEH Properties, Ltd., which became the owner of the 24.90 acres, the 30-foot easement, and Vacation Village Hotel and Casino.

The following year, in 1989, Transamerica granted CEH a second 40-foot easement across its property for purposes of ingress and egress. The 30-foot and 40-foot easements (hereinafter "access easements") were obtained in order to provide an access to the western end of the property, separate and removed from the public entrance to Vacation Village.

A. The Avigation Easements

When the parcel was transferred from Twin Lake to the Heers brothers, in 1971, approximately 30 acres were zoned as H-1 (Limited Resort and Apartment) and 20 acres were zoned as RE (Rural Estates Residential). Because the County limited Twin Lake's original request to build a four-story casino to two-stories, the Heers brothers, in 1971, sought approval from the County to rezone the 20 acres classified as RE to H-1. This was done so that they could expand horizontally, instead of vertically. The County partially conditioned approval of the rezoning request upon the Heers brothers granting an avigation easement to it.

In August 1971, the Heers brothers granted the County an avigation easement and the County signed a Resolution of Intent to Reclassify Real Property, which provided that the rezoning of the 20 acres would be consummated upon the completion of the proposed building. The avigation easement granted the County "a perpetual right of flight, ingress to and egress from the airspace over the lands," and the Heers

brothers further agreed to release and hold harmless the Defendant for losses caused by "noise or the psychological effect of aircraft." (Defs.' Ex. O). In 1974, the Heers brothers had completed 344 rooms and applied to the County for their fourth extension of time. However, their request for an extension of time was denied and the easement was never recorded.

Shortly thereafter, the Heers brothers sought approval to continue construction on the portion of the property already zoned H-1. The application was granted subject to various conditions. Subsequently, the Heers brothers experienced financial hardship and declared bankruptcy. It was at this time that the parcel was split between Transamerica and Carol Heers.

In 1988, CEH, which took over Carol Heers's interest in the property and Vacation Village, again applied to the County to have the RE portion of the property rezoned to H-1. As envisioned by CEH, the Vacation Village project would be located approximately 2,600 ft southwest of the approach for runway 1R and would consist of one 80 foot above ground level sign, one 47 foot above ground level casino, five 28 foot above ground level hotel buildings, and three 76 foot above ground level hotel buildings. Once again, approval was partially conditioned on CEH granting the County an avigation easement. In June 1988, CEH granted the County the right

> to have perpetual right of flight, for the passage of aircraft in the air space above the surface of said premises, together with the right to cause in said air space such noise as may be inherent in the operation of aircraft, now known or hereafter used for navigation of or flight in the air using said air space or landing at, or taking-off from or operating at, or on the premises known as McCarran International Airport, Nellis Air Force Base, North Las Vegas Airport, Overton Airport

> and Indian Springs Air Force Base, Sky Harbor Airport, Laughlin/Bullhead Airport.[2]

(Defs.' Ex. AE). On June 8, 1988, the County approved a zone change from RE to H-1 and a use permit to construct and maintain a 501 room, two-story hotel, and an 85,000 square foot casino.

B. The Airport Expansion

Subsequent to the granting of the 1988 avigation easement, the County and McCarren International Airport began planning to expand the airport to handle an increase in the arrivals and departures of large aircraft. At this time, there existed two runways running northeast and southwest, 1L-19R and 1R-19L. Runway 1L-19R, while in existence, was not capable of handling large aircraft, and Runway 1R-19L, while capable of handling the larger aircraft was not a precision instrument approach runway. As a result of the airport expansion, Runway 1L-19R was removed and a larger runway, with the same designation, was constructed in its place. Runway 1R-19L was modified to allow for a precision instrument approach, which resulted in a lower 50:1 approach path for the runway instead of the previous 20:1 approach path. Because of these improvements, there was an increase in the flights of large aircraft, such as the Boeing 727, Boeing 747, Boeing 757, and McDonald Douglas MD-80, directly over the property. As the County stated at trial, there was also an accompanying decrease in the altitude at which these aircraft were flying while crossing over the property.

C. The Continued Property Development

In planning for the expansion and modification of the airport, the County anticipated that the surrounding properties

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[2] Most, if not all, of the people who sought approval from the County to build on their ground, or to change zoning designations, were required to sign these same generic avigation easements.

would be affected. In response, the County approved the appraisal of what it thought would be the impacted properties, which included Vacation Village. It was also at this time that discussions began to take place between Vacation Village and the airport about reducing the height of the hotel and casino in order to better accommodate the lower approach path over the property. Vacation Village provided revised elevation plans and agreed to redesign and lower the height of the hotel and casino to 42 feet.

Then, in 1990, the Federal Aviation Administration (FAA) issued two hazard determinations for the proposed Vacation Village project. The FAA found that portions of the project penetrated the lowered approach path for runway 1R. Specifically, the sign penetrated the surface by 53.4 feet, the casino by 8.4 feet, and the hotel buildings by 40 feet. In response to continuing concern over the height of the hotel and casino, Vacation Village once again agreed to further reduce the hotel and casino height to 38 feet, and the FAA approved construction at that height.

In March 1990, the County notified Vacation Village that it had decided to have the property appraised for condemnation. This decision was based not only on the property's relation to the runways but also because the County was considering using the property as a southern surface access from I-15 to the airport. However, in August 1990 Vacation Village was informed that the property would not be condemned since it was going to be outside of the corridor for the 1-15 airport connector project.

D. The Access Easements

Although the County decided not to condemn the Vacation Village property, it did decide to acquire the 30 acres owned by Transamerica, located just south of Vacation Village. At the time, the Transamerica property was still subject to two easements held by CEH. The first was the 30-foot easement

retained by Carol Heers when the 30 acres were transferred to Transamerica, and the second was a 40-foot easement transferred from Transamerica in 1989.

E. The Zoning of the Property

At all times since Twin Lake purchased the Vacation Village property in 1964, there have been various zoning ordinances in place regulating the use of airspace and land surrounding the airport. Consequently, a more detailed discussion of these ordinances is necessary to illustrate their impact on the property.

As early as 1946, the County enacted Ordinance 61, known as the "Land Use Ordinance of Clark, County Nevada." Since that time, various ordinances modifying the Clark County Code have been passed as the zoning needs surrounding the airport have changed. Ordinance 728, passed in 1981, adopted a new § 29.50 of the Clark County Code in order to limit the height of objects around public use airports. Under this ordinance, structures on the Vacation Village property were restricted to heights varying from 74 feet to 104 feet, depending upon their location on the property. Then in 1990, Ordinance 1221 further amended § 29.50 by adopting new zoning maps and height restrictions. The passing of this ordinance resulted in a decrease in the maximum building heights for Vacation Village. Under 1221, structures were restricted to heights varying from 5 feet to 25 feet. Section 29.50.30 of the Clark County Code further set forth that "nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter."

Because of Vacation Village's proximity to the airport, it has also been subject to regulations delineating land use. In 1990, Ordinance 1198 was passed, which amended Title 29 by adopting an amended and revised Airport Environs

Overlay District. The new Overlay District was set forth in § 29.51 of the Clark County Code and described 1.25 acres of Vacation Village as a runway protection zone (hereinafter "RPZ"). This description limited the development of the 1.25 acres to uses such as a parking lot, a water area, or landscaping.

II. CONCLUSIONS OF LAW

As previously mentioned, Vacation Village has alleged inverse condemnation of airspace, inverse condemnation of 1.25 acres of real property, and inverse condemnation of the two access easements.

A. Inverse Condemnation of Airspace

In response to Vacation Village's claim of inverse condemnation of airspace, the County raises several defenses. First, the County asserts that Vacation Village has no property interest in the airspace above its land, and, therefore, there can be no taking. Second, the County alleges that even if Vacation Village does have a property interest in the airspace, it conveyed that interest to the County in the 1971 and 1988 avigation easements. Finally, the County argues that even if Vacation Village does have a property interest in the airspace and the avigation easements did not convey that interest to the County, Vacation Village still fails to demonstrate that a compensable taking has occurred.

1. Airspace as a Property Right

Defendant relies upon 49 U.S.C. §§ 40101-40104 to claim that Vacation Village has no property interest in the airspace above it. Under these statutes, the "United States Government has exclusive sovereignty of airspace." 49 U.S.C. § 40103(a)(1). With that sovereignty, the United States Government has reserved for the citizens a right of transit through the navigable airspace, which includes the airspace necessary

to "ensure the safety in the takeoff and landing of aircraft." 49 U.S.C. § 40102(a)(30).

Defendant also relies upon N.R.S. §§ 493.010-493.120 for the same proposition. The Nevada Legislature has described the lawfulness of flight over the lands and waters of Nevada as follows:

> 1. Flight in aircraft over the lands and waters of this state is lawful:
>
> a. Unless at such a low altitude as to interfere with the then existing use to which the land or water, or space over the land or water, is put by the owner.
>
> b. Unless so conducted as to be imminently dangerous to, persons or property lawfully on the land or water beneath.

N.R.S. § 493.050.

Nevada intended that its aeronautical statutes be compatible with those of the federal government. Nevada Revised Statutes § 493.120, Uniformity of Interpretation, sets forth that

> NRS 493.010 to 493.120, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of those states which enact them, and to harmonize, as far as possible, with federal laws and regulations on the subject of aeronautics.

It is therefore appropriate and "necessary to read these statutes in conjunction with the enactments of the United State Congress under the commerce clause of the United States Constitution, as interpreted by the Supreme Court of the United States." *Roark v. Caldwell*, 394 P.2d 641, 643 (Idaho 1964) (interpreting the Idaho aeronautics statute, which contains language similar to that used in the Nevada statute).

The old common law recognized that land ownership extended to the heavens. *United States v. Causby*, 328 U.S.

256, 260 (1946). With the advent of flight, successive authorized agencies limited this notion to specified heights, thereby creating "navigable airspace," so as to preserve the air as a public highway, free from countless trespass suits. *Id.* at 261. The statutes cited by the County are some of the more recent limitations placed upon, and redefining, this ancient doctrine.

However, the concept of navigable airspace is not without its own constraints. After all, "the use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected." *Griggs v. Allegheny County*, 369 U.S. 84, 89 (1962) (quoting *Causby*, 328 U.S at 264). Courts have recognized that "[t]he landowner owns at least, as much of the space above the ground as [he] can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material" *Causby*, 328 U.S. at 264. Accordingly, the courts in interpreting and applying these statutes have routinely held that arrivals and departures of aircraft that occur below 500 ft and that qualify as invasions of property, under a three-part test laid out in *Causby*, are takings. *See Griggs v. Allegheny*, 369 U.S. 84 (1962); *Matson v. United States*, 171 F.Supp. 283 (Ct. Cl. 1959) (holding that continuous invasions of aircraft flying below 500 ft constituted a taking); *Aaron v. United States*, 311 F.2d 798 (Ct.C1.963) (distinguishing between claims that occurred below 500 ft and those that were above 500 ft.); *Hodges Indus., Inc. v. United States*, 355 F.2d 592 (Ct. Cl. 1966) (holding that those flights constituting a dire, immediate, and substantial interference below 500 ft were a taking). Thus, Vacation Village does retain a property interest in some of the airspace above the property. The Court next considers the various avigation easements granted by Vacation Village and will save until the actual takings analysis the issue of whether there was an invasion of the property by the County.

2. The Avigation Easements

In its defense, the County alleges that the 1971 and 1988 avigation easements gave it the property rights that Vacation Village is now claiming were taken. Vacation Village responds to this defense by claiming that even if it did grant an avigation easement to the County, the easement was unconstitutionally exacted from it and is consequently null and void. The County asserts, however, that Vacation Village waived its exaction argument and is estopped from making it now. The Court first considers whether Vacation Village has waived its exaction argument.

a. Waiver

The United States Supreme Court has noted that a party "cannot claim the benefit of statutes and afterwards assail their validity. There is no sanctity in such a claim of constitutional right as prevents it being waived as any other claim of right may be." *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412 (1917); *see also Fahey v. Mallonee*, 332 U.S. 245, 255 (1947) ("It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions'"). Indeed, one method of waiving a benefit is through conduct that is "inconsistent with any other intention than to waive the right." *Mahban v. MGM Grand Hotels, Inc.*, 691 P.2d 421, 423 (Nev. 1984) (per curiam). *See Convent of Saint Joseph v. City of Winston-Salem*, 90 S.E.2d 879, 885 (1956).

Land-use and zoning are two contexts in which the issue of waiver is raised. Within this area, it is generally held that "a landowner who accepts and complies with the conditions of a building permit cannot later sue the issuing public entity for inverse condemnation for the cost of compliance." *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 941, 218 Cal.Rptr. 839 (Cal. Ct. App. 1985).

In the case at hand, the Nevada Legislature, through its police power, delegated to the County a certain amount of

regulatory authority in regards to the airport. Specifically, it was given authority in airport hazard areas to "prohibit those land uses which could cause a hazard to air traffic and regulate and restrict the height to which structures and trees may be erected or allowed to grow." N.R.S. § 497.040. Complying with the authority delegated to the County, Vacation Village, on two separate occasions, requested approval to have a portion of its property rezoned to H-1 so that it could build a hotel and casino on the property. On both occasions, the County conditioned approval upon the granting of an avigation easement. As a result of complying with the conditions, the County agreed to rezone the property and gave its approval to build a hotel and casino thereon. Several years after the 1988 avigation easement was granted and after the hotel and casino were substantially completed, Vacation Village comes forward and contends that the avigation easements were unconstitutionally exacted.

In petitioning the Court to allow its claim, Vacation Village relies upon *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914, 941, 218 Cal.Rptr. 839 (Cal. Ct. App. 1985). In this case, defendant, irrigation district, sold plaintiffs property around the Salton Sea. *Id.* Imperial County permitted development on the property, but required the property owners to sign written agreements, agreeing not to sue the County or defendant for flooding, and to grant defendant flooding easements[3] over their property. In time, the property flooded and plaintiffs brought suit. *Id.* at 928.

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[3] Examining the language of the purported easement and the conduct of the parties, the court concluded that the document was not an easement but rather it was an exculpatory clause that violated public policy. *Salton Bay Marina*, 218 Cal.Rptr. at 938-941. The purported easement contained the following language: "THE SOLE PURPOSE of this grant of easement is to absolve grantees from future liability for any damages to the property . . ." *Id.* at 936. Furthermore, the court noted, "[t]he acts of encouraging and allowing development of the property are clearly inconsistent with an intent to flood the property" *Id.*

The California Court of Appeals, after retransfer from the California Supreme Court, found that the plaintiffs had not waived their claims, even though they had granted the easements and built upon their property prior to bringing suit. *Id.* at 942. The court denied defendant's estoppel argument because the purchasers did not truly accept the condition as the price of obtaining, the right to develop their property." *Id.* In other words, the conditions were not readily apparent and did not have an immediate impact. *Id.* "Under these circumstances where the condition concerned only a future possibility, landowners should not be estopped from seeking damages by inverse condemnation once the actual taking occurs." *Id.* at 942 (emphasis removed).

The facts of the case at hand do not lead to the same result. When Vacation Village signed the 1988 avigation easement, it had engaged in negotiations over building heights with the County for many years. It knew there was an airport across the street. It knew planes were already flying overhead, and it knew that building heights were an important issue that directly affected the development of Vacation Village. The effect of signing an avigation easement was apparent and the impact was immediate.

Furthermore, it cannot be said that Vacation Village did not accept the easement as the price of obtaining the right to develop-and build the hotel and casino. Throughout the development of its property, it continually agreed to lower the heights of its hotel and casino so that it would not interfere with the airport and so that it could continue development. Even when it appeared that a condemnation action was imminent, Vacation Village continued to negotiate With the County in an attempt to develop a hotel and casino in some form on its property.

Since Vacation Village has waived its exaction argument, the Court does not consider the merits of that claim. The

Court will, however, consider what rights the avigation easements conveyed to the County.

b. The Language of the Avigation Easement

Generally, the extent of an easement created by conveyance, like any other conveyance of rights in real property, is fixed by the conveyance itself, and "[e]xtrinsic evidence is not admissible for the purpose of interpreting clear and unambiguous terms." *Sievers v. Zenoff*, 573 P.2d 1190, 1192 (Nev. 1978); *see also S.O.C., Inc. v. Mirage Casino-Hotel*, 23 P.3d 243, 247 (Nev. 2001); *Cox v. Glenbrook Co.*, 371 P.2d 647, 652 (Nev. 1962). However, "[w]hen the width [of the easement] is not specified, the conveying instrument must be construed in the light of the facts and circumstances existing at its date and affecting the property . . ." *Cox*, 371 P.2d at 654. More specifically, the court looks to the intention of the parties at the time of the grant and to the "width of the easement as it existed at the time of the grant." *Id.* The court must also keep in mind that "[a] party is privileged to use another's land only to the extent expressly allowed by the easement." *S.O.C.*, 23 P.3d at 247. Therefore, easements are generally "construed strictly in favor of the owner of the property . . ." and "an easement is only as broad as needed to achieve the intended result . . ." *Id.*

The County contends that the avigation easements are clear and unambiguous. This Court, however, finds otherwise. The Nevada Supreme. Court has held that a right-of-way that provides that the holder of the dominant tenement may drive through the servient tenement, but that does not set forth the width and other dimensions of the right-of-way is ambiguous. *Cox*, 371 P.2d at 653-54. The Court finds this situation analogous to the current case. Here, there is an airport with an avigation easement that allows arriving and departing jets to fly through Vacation Village's airspace i.e., property, but that does not set forth the height or other dimensions of the

easement. Therefore, the Court will consider the intent of the parties and dimensions of use at the time of the grant.

Beginning in the late 1960s, Twin Lake and the Heers brothers first began requesting approval to build a hotel and casino on the property. As later envisioned, Vacation Village would include one 80 foot above ground level sign, one 47 foot above ground level casino, five 28 foot above ground level hotel buildings, and three 76 foot above ground level hotel buildings. Vacation Village saw the granting of the avigation easements to the County as a means through which it could obtain the necessary approvals to continue to develop. From these facts, it is readily apparent that Vacation Village did not intend to grant the County an easement in all of the airspace from the ground up, as the County contends.

Examining the dimensions of use at the time of granting yields a similar result. When the 1988 avigation easement was granted, the airport was not using the airspace over the Vacation Village property from the ground up. The aircraft traveling over Vacation Village were using the airspace in the 20:1 approach path that extended from the primary surface for Runway 1R-19L. Additionally, at that time, Runway 1L-19R was much smaller and could not handle large aircraft. Hence the frequency of large aircraft arriving and departing over Vacation Village was much less. The Court concludes that Vacation Village granted the County an avigation easement allowing arriving and departing aircraft to use the 20:1 approach path that extends from the end of the primary surface for Runway 1R-19L. The avigation easement further allows the noise that is inherent from operating such aircraft.

3. Takings Analysis

Because Vacation Village has a property interest in a reasonable amount of airspace over its property and since the avigation easements granted by Vacation Village did not convey all of the airspace from the ground up, the Court will

now consider whether a taking has occurred, thus, entitling Vacation Village to compensation.

Article I, section 8 of the Nevada Constitution states, "[p]rivate property shall not be taken for public use without just compensation having been first made." The Fifth Amendment to the U.S. Constitution similarly provides "nor shall private property be taken for public use, without just compensation." Nevada courts have not decided when the flights of arriving and departing aircraft constitute a taking of property under its constitution. Because both the County and Vacation Village argue that Nevada jurisprudence tracks the federal standard, the Court assumes, without deciding, that the federal and state constitutions provide the same protections from arriving and departing aircraft.[4]

Takings jurisprudence has for many years distinguished between a physical taking and a regulatory taking. As a result, the law varies greatly depending upon the type of taking alleged. *United States v. Causby*, 328 U.S. 256 (1946); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. (1978); *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996).

The United States Supreme Court, in *Causby*, recognized that "the flight of airplanes, which skim the surface [of the ground] but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it," and "that the landowner, as an incident to his ownership, has a claim to [superadjacent airspace at this low altitude] and that invasions of it are in the same category as invasions of the surface. *Causby*, 328 U.S. at 264-265. Close to twenty years

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[4] The Court notes that differences in language between the two constitutions indicate that there may be a discrepancy in the timing of payment required by each constitution. However, the timing of the payment is not at issue in the present case.

later, the United States Supreme Court further stated that the approach path for a runway "is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam . . . an adequate approach way is as a necessary a part of an airport as is the ground on which the airstrip, itself, is constructed." *Griggs*, 369 U.S. at 534. Accordingly, the Court considers the alleged taking of airspace under the physical taking rubric laid out in *Causby* and its progeny.

Causby and subsequent cases have set forth the requirements necessary for a claimant to demonstrate that overflights by aircraft constitute a taking of an avigation easement and therefore require compensation: 1) the aircraft must fly directly over claminant's land; 2) the flights must be low and frequent; and 3) the flights must pose a direct, substantial, and immediate interference with the enjoyment and use of the land. *Causby*, 328 U.S. at 266; *A.J. Hodges Indus. Inc., v. United States*, 355 F.2d 592, 595-96 (Ct. Cl. 1966); *Brown*, 73 F.3d at 1102. Absent such a showing, there can be no taking.

The County does not dispute that the first two requirements have been met. It does, however, argue that Vacation Village has not satisfied the third requirement of demonstrating that the overflights directly, immediately, and substantially interfere with its use of the land. In so doing, the County urges the Court to follow the analysis used by the Texas Supreme Court in *Austin v. Travis County Landfill Co.*, 73 S.W.3d 234 (Tex. 2002). Alternatively, Vacation Village asks the Court to follow the analysis employed by the United States Court of Appeals, for the Federal Circuit, in *Brown v. United States*, 73 F.3d 1100 (Fed. Cir. 1996). While the Court notes it prefers the reasoning of the United States Court of Appeals in *Brown*, it finds that the result is the same regardless of whether the analysis of *Brown* or *Austin* is employed.

In *Brown*, plaintiffs owned a 6,858 acre ranch that they intended to develop and later sell as recreational property.

The Air Force purchased ground near the plaintiffs and began training exercises that required frequent, low altitude flights over the ranch. Even though the flights were frequent and at low altitudes, they did not disturb plaintiff's cattle, nor did they interfere with other revenue generating activities located on the ranch at the time. Defendant argued that "enjoyment and use," as stated in the third prong of *Causby*, only had reference to plaintiff's current use of the property. Since revenues from the use of the property remained the same, defendant argued that plaintiffs failed the *Causby* test.

In discussing this issue, the court noted that the term "enjoyment and use" allowed for a landowner to "enjoy not only the right to put their land to a particular present use, but also to hold the land for investment and appreciation . . ." *Brown*, 73 F.3d at 1104; See *Causby*, 328 U.S. at 261 (noting that a taking may involve the impairment of future uses of land). The court further stated, "[a]n important element in a property owner's bundle of rights is the right to economically exploit his land—the right to sell the land for the best price available in the market, based not only on its current use but on potential other uses for which the market is presently prepared to pay." *Brown*, 73 F.3d at 1104. Accordingly, the court held that a significant and immediate decline in, market price is strongly suggestive of an immediate, direct, and substantial interference with the enjoyment and use of property. *Id.* at 1104-1105.

In *Austin*, the airport, located near plaintiff, was originally owned by the Air Force but later reverted to the defendant. *Austin*, 73 S.W.3d at 237. Unlike *Brown*, or the case at hand, plaintiff had not only granted an avigation easement for the flight of military aircraft over the property but had also granted a clearance easement, which allowed defendant to prohibit or remove structures or even vegetation that extended into the approach paths. *Id.*

The County asserts that this case stands for the conclusion that a takings claim arises under *Causby* only when overflights have adversely affected an existing land use. The Court does not agree and believes that the County's reliance on *Austin* for this proposition is misplaced. The Texas Supreme Court interpreted *Causby* to require a landowner to demonstrate that the overflights "directly and immediately impact the land so that the property is no longer usable for its *intended* purpose." *Id.* at 240. (emphasis added).

In deciding against the plaintiff, the Texas Supreme Court focused its attention on four general categories of evidence marshaled by plaintiff to demonstrate an immediate, direct, and substantial effect on the property. *Id.* at 241. One of the categories of evidence the court examined was the decrease in fair market value of the property. *Id.* In its analysis, the Texas Supreme Court noted that fair-market-value decline is a factor in determining whether there has been an interference in the property's use and enjoyment. *Id.* at 242. The court was reluctant to consider decline in market-value in this case, however, because the appraisers in looking at the decline in market value for the property did not consider the burden placed on the property by the avigation easement or the additional clearance easement, and the plaintiffs were not able to demonstrate that the overflights contributed to the market-value decline. *Id.* at 238.

The Court finds that Vacation Village has shown that the increased frequency of flights of large general aviation aircraft over its property, below the 20:1 avigation easement, directly, substantially, and immediately interfered with the enjoyment and use of its property. The intended use of the property was as a hotel and casino with the heights of various structures ranging from 28 feet to 80 feet. When the FAA issued its hazard determinations for the proposed development, it made it clear that the lower 50:1 approach path and the aircraft traveling along it interfere with this intended use.

Moreover, because aircraft are using a lower approach path over Vacation Village, it has suffered a decline in the market value of its property. Considering this factor is appropriate and in accordance with the views of both the *Austin* and *Brown* courts. The Court finds that the decline in market value is strongly suggestive that there has been an interference with the enjoyment and use of the property.

The Court notes that while it cites the law applied in *Austin*, it arrives at a different result because of factual dissimilarities between the two cases. The dissimilarities include, but are not limited to 1) the fact that Vacation Village did not grant a clearance easement to the County; 2) that the County's appraiser took into account the previously granted avigation easement when she calculated the "before" value of the property;[5] and 3) that Vacation Village was able to demonstrate that the decreased altitude in arriving and departing aircraft contributed to the decline in market value. Accordingly, the Court finds that the County did take the difference in airspace between the 20:1 approach path granted in the 1988 avigation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion.

B. Inverse Condemnation of 1.25 Acres

As previously discussed, there are stark differences in the analysis used for a physical taking as opposed to a regulatory taking. In its third cause of action Vacation Village claims that by enacting § 29.51 of the Clark County Code, the County condemned and took an estimated 1.25 acres of the Vacation Village property for its own use as an RPZ.

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[5] The County's appraiser, Ms. Lowe, calculated the "before" condition of the Vacation Village property assuming that it was subject to Ordinance 728. This Ordinance imposed height limitations on structures in accordance with the 20:1 approach path, which the Court has held was granted to the County in the 1988 avigation easement.

Thus subjecting this claim to scrutiny under the regulatory taking analysis.

Within the regulatory takings jurisprudence there exists two types of analysis: a categorical analysis and an ad hoc factual analysis. *Palazzolo v. R.I.*, 533 U.S. 606, 617 (2001). The categorical analysis, which the Court examines first, sets forth that with certain qualifications a "regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause." *Id.* at 617 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)). A regulation that is not considered a categorical taking may yet be considered a taking provided that it satisfies a complex set of factors, as used in *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (U.S., 1978). *Id.* However, the Court must first address the threshold consideration of whether Vacation Village's claim is ripe for adjudication.

1. Ripeness

In a regulatory taking analysis, the court examines a regulation and determines whether the regulation "goes too far," that is results in a taking of the property. *MacDonald v. Yolo County*, 477 U.S. 340, 348 (1986). As the County correctly indicates, "[a] court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes." *Id.* "Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law." *Palazzolo*, 533 U.S. at 620-621.

However, "[t]he requirements of ripeness in the area of Fifth Amendment takings also cannot be so extended as to become more exhaustive than the substantive issues presented

by the taking claim itself." *Loveladies Harbor, Inc. v. United States*, 15 Cl.Ct. 381, 386 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994). Courts are not to require a property owner to resort to "piecemeal litigation" in order to obtain relief. *MacDonald*, 477 U.S. at 350 n.7. Therefore, "when the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 533 U.S. at 620.

In the instant case, it cannot be said that Vacation Village submitted a single set of grandiose building plans to the County for approval and that upon rejection of that single plan has brought suit. Indeed, Vacation Village, through one of its various business entities, has been discussing with the County the development of the hotel and casino since the 1960s. These discussions have resulted in the imposition of increasing height and use limitations. Thus giving the County ample opportunity to exercise discretion in considering development plans. Examining the recent use applications involving the 1.25 acres reveals that Vacation Village has requested to use that land for activities ranging from hotel development to a temporary automobile sales show. Vacation Village received approval for all of these uses. However, the approvals provided that none of the proposed activities could occur on the 1.25 acres.

Furthermore, the permissible uses of the property are known to a reasonable degree of certainty. Section 29.51 of the Clark County Code sets forth a small list of allowable uses for land located within an RPZ. Those allowable uses are primarily limited to parking; landscaping, utility, and communication. Because the nature and extent of permitted development is sufficiently known and the County has had an opportunity to exercise its discretion, there is no need to force Vacation Village to resort to piecemeal litigation to resolve the matter.

2. Categorical Taking

Using the categorical analysis, a court first considers whether all economic use has been denied by the regulation. Under this rule, for a taking to occur, a regulation must allow "*no* productive or economically beneficial use of the land."[6] *Tahoe*, 535 U.S. at 330. The test for a categorical regulatory taking ultimately requires the court to compare "the value that has been taken from the property with the value that remains in the property." *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 774 (9th Cir. 2000), *aff'd* 535 U.S. 302 (2002).

For purposes of determining the denominator in the fraction, the court looks at the property as a whole. The United States Supreme Court has noted that regulatory taking jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . ." *Tahoe*, 535 U.S. at 327 (quoting *Penn Central*, 438 U.S. at 130-131).

Accordingly, the Court considers the effect of the regulation upon the entire 24-acre property and not just the effect of the regulation on the 1.25 acres. Consequently, even if the Court were to assume that the 1.25 acres were totally deprived of all economic benefit, the remaining 95% of the property is not. In fact, a casino and hotel are located on the

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[6] "The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%." *Tahoe*, 535 U.S. at 330 (referring to the opinion in *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

remaining 23.65 acres of the property.[7] So, while the regulation does impose a severe burden upon the 1.25 acres, it can hardly be said that the entire property is deprived of all economic benefit, as a result of the regulation. The Court next considers the claim under the framework established in *Penn Central*.

3. *Penn Central*

The *Penn Central* test is "characterized by 'essentially ad hoc, factual inquires." *Tahoe*, 535 U.S. at 322 (quoting *Penn Central*, 438 U.S., at 124). These inquires are designed to allow "'careful examination and weighing of all the relevant circumstances." *Id.* (quoting *Pallazzolo*, 533 U.S., at 636). Under the *Penn Central* test, we examine a) the character of the government action; b) the regulation's economic effect on the landowner; and c) the extent to which the regulation interferes with the reasonable investment-backed expectations. *Palazzolo*, 533 U.S. at 617. Once again these inquiries consider the regulation's effect upon the entire parcel and not the effect upon any discrete segment. *Tahoe*, 535 U.S. at 327.

a. Character of Government Action

Determining the character of the government action requires a balancing of Vacation Village's interests against the County's need to protect the public. *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 485-86 (1987). The Nevada Legislature delegated its police power to the County in order that it might enforce airport zoning and prevent hazards. N.R.S. § 497.040. The Nevada Legislature found that "an airport hazard endangers the lives and property of users of the airport and of occupants of land in its vicinity,

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[7] In 1993, in a letter written by CEH to the County, CEH stated that Vacation Village's occupancy rate exceeded 90% and average gaming revenue per guest exceeded $350 per day. Furthermore, for the years 1994 through 2000, annual revenue for Vacation Village ranged from $10.6 million to $14.1 million.

and also, if of the obstruction type, in effect reduces the size of area available for the landing, takeoff and maneuvering of aircraft, thus tending to destroy or impair the utility of the airport and the public investment therein." N.R.S. § 497.030. The Court is convinced that there is a genuine and substantial need in regulating the airspace and use of land surrounding an airport and that the public, as a whole, benefits from such regulation.

b. Economic Effect

While the Court notes that the designation as an RPZ did limit the uses for which the 1.25 acres could be used, it did not eliminate all potential uses. That small portion of the property could still be put to use as a water feature, as some form of landscaping, or possibly as a parking lot. Furthermore, as already discussed the remaining 95% of the property is not adversely affected by § 29.51. As the United States Supreme Court has stated, "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Tahoe*, 535 U.S. at 327 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

c. Investment-Backed Expectations

While § 29.51 may have interfered to a certain extent with Vacation Village's investment-backed expectations, the United States Supreme Court has allowed the frustration of investment-backed expectations when the regulation furthers important public policies. *Penn Central*, 438 U.S. at 124-128. This is because "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Id.* at 124.

Furthermore, it is important to note that Vacation Village's expectations have always been limited by the fact that it is located across from an airport, which has been in existence from before Twin Lake took over ownership of the property.

Even back in 1964, when Twin Lake first purchased the property, there were regulations limiting the use of airspace and land surrounding the airport. For the aforementioned reasons, the Court finds that § 29.51 of the Clark County Code did not take 1.25 acres of the Vacation Village property.

C. Access Easements

At the outset, it is noted that the parties have stipulated that the County physically obstructed Vacation Village's use of the access easements when it took the Transamerica parcel for the I-15 interchange. The United States Supreme Court has stated, "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." *Loretto*, 458 U.S. at 427. The County is permanently and physically occupying Vacation Village's easements. Therefore, there is little question that a taking has occurred.

C. Compensation

The government must pay the fair market value for private property taken for a public purpose. *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1446 (9th Cir. 1984). "Fair market value is the amount of money which a well informed purchaser, willing but not obliged to buy the property would pay, and which a well informed purchaser, willing but not obliged to sell it would accept, taking into consideration all uses to which the property is adapted and might in reason be applied." *State v. Wilson*, 493 F.2d 1252 (Wash. App. 1972). When considering "all uses," court appropriately examine "evidence regarding the highest and best use to which the land is put or reasonably may be adapted in the future . . . and assume that buyers or seller of ordinary prudence are knowledgeable and not motivated by speculation or conjecture." *760.807 Acres of Land*, 731 F.2d at 1446. In most condemnation cases, the best evidence of fair market value of real property is found in "sales of comparable property within

a reasonable time before the taking." *City of Elko v. Zillich*, 683 P.2d 5, 7 (Nev. 1984). Any decrease or increase in the fair market value of the property before the date of valuation which is caused by the public work must be disregarded. N.R.S. § 37.112.

Both parties retained appraisers to address the compensation questions. Charles E. Jack IV was retained by Vacation Village and Shelli Lowe was retained by Clark County. Both appraisers employed the same general technique in valuing the airspace. They both subtracted the value of the property after the taking from the value of the property prior to the taking. This is where the similarities end, however.

In calculating the before-value of the property, Mr. Jack operated under the premise that there were no height restrictions on the property. The Court's findings, however, make it evident that the premise of no height restrictions is incorrect. There was an easement conveyed to the County for the airspace above a 20:1 approach path extending from the end of the runway. Mr. Jack's reliance upon the premise that there were no height restrictions renders his before-value of the airspace useless in the current calculation of compensation.

Ms. Lowe in her before-value calculation does take into account height restrictions over Vacation Village. However, her use of comparables is suspect. Her comparables are all located further south than Vacation Village, and therefore, further away from the Strip. Ultimately, Ms. Lowe calculates the before-value of the Vacation Village property at $5.50 a square foot and the after-condition of the property at $5.00 sq. ft. This results in an award of compensation of $543,000.

The result is that there is no clearly correct valuation of the airspace. Mr. Jack employed an incorrect assumption and Ms. Lowe chose questionable comparables. At trial, counsel stated that they would prefer getting new appraisals based

rather than have the Court attempt to blend Mr. Jack's and Ms. Lowe's appraisals. Accordingly, the Court withholds ruling upon an amount of compensation for all claims in this case until new a[illegible]isals can be obtained.

III. JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff Vacation Village, Inc. be awarded compensation from Clark County, Nevada for the taking of airspace between the 20:1 approach path granted in the avigation easement and the lower 50:1 precision instrument approach path.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Vacation Village be awarded compensation from the County for the taking of the access easements.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the County did not take Vacation Village's 1.25 acres when it enacted § 29.51 of the Clark County Code.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that compensation will be determined after additional appraisals have been obtained.

DATED this 29th day of Dec., 2004.

/s/ Robert C. Jones
ROBERT C. JONES
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E

FEDERAL STATUTES

49 U.S.C. § 40102. Definitions

(a) General definitions.—In this part—

* * * *

(32) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

* * * *

49 U.S.C. § 40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit.—(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace. To further that right, the Secretary of Transportation shall consult with the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792) before prescribing a regulation or issuing an order or procedure that will have a significant impact on the accessibility of commercial airports or commercial air transportation for handicapped individuals.

(b) Use of airspace.—(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for—

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

* * * *

49 U.S.C. § 47107. Project grant application approval conditioned on assurances about airport operations

(a) General written assurances.—The Secretary of Transportation may approve a project grant application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that—

* * * *

(9) appropriate action will be taken to ensure that terminal airspace required to protect instrument and visual operations to the airport (including operations at established minimum flight altitudes) will be cleared and protected by mitigating existing, and preventing future, airport hazards;

(10) appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations;

* * * *

APPENDIX F

FEDERAL REGULATION

14 C.F.R. § 91.119 Minimum safe altitudes: General.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

APPENDIX G

LOCAL ORDINANCES

Bill No. 12-16-80-2

SUMMARY—An Ordinance adopting a new Chapter 29.50 to limit the height of objects around all public use airports within Clark County, Nevada, and repealing the existing Chapter 29.50.

ORDINANCE NO.—728
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29 OF THE CLARK COUNTY CODE BY ADDING THERETO A NEW CHAPTER DESIGNATED AS 29.50 WHICH REGULATES AND RESTRICTS THE HEIGHT OF STRUCTURES AND OTHERWISE REGULATES THE USE OF THE PROPERTY WITHIN THE JURISDICTION OF CLARK COUNTY, NEVADA AND IN THE VICINITY OF ALL PUBLIC USE AIRPORTS BY CREATING THE APPROPRIATE ZONES AND ESTABLISHING THE BOUNDARIES THEREOF; PROVIDING FOR CHANGES IN THE RESTRICTIONS AND BOUNDARIES OF SUCH ZONES; DEFINING CERTAIN TERMS USED HEREIN; REFERRING TO THE MC CARRAN INTERNATIONAL AIRPORT AIRSPACE ZONING MAP WHICH IS INCORPORATED IN AND MADE A PART OF THIS ORDINANCE; REPEALING THE EXISTING CHAPTER 29.50 OF THE CLARK COUNTY CODE; PROVIDING FOR ENFORCEMENT AND PROVIDING OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Legislative Findings. It is hereby found that an obstruction has the potential for endangering the lives and

property of users of any public use Airport, and property or occupants of land within Clark County, Nevada, in the vicinity of these Airports; that an obstruction may affect existing and future instrument approach minimums of any public use Airport; that an obstruction may reduce the size of the areas available for the landing, takeoff, and maneuvering of aircraft, thus tending to destroy or impair the utility and capacity of these Airports and the public investment therein. Accordingly, it is declared:

(A) That the establishment of an obstruction has the potential of being a public nuisance and may injure the region served by McCarran International Airport or any other public use Airport;

(B) That it is necessary in the interest of the public health, public safety, and general welfare that the establishment of obstructions that are a hazard to air navigation be prevented; and

(C) That the prevention of these obstructions should be accomplished to the extent legally possible by the exercise of the police power without compensation.

SECTION 2. That the present Chapter 29.50 of the Clark County Code is hereby repealed in its entirety.

SECTION 3. That a new Chapter 29.50 be adopted as follows:

CHAPTER 29.50

PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS

Sections:

29.50.010 Definitions
29.50.020 Airport zones
29.50.030 Airport zone height limitations
29.50.040 Use restrictions
29.50.050 Nonconforming uses
29.50.060 Variances

29.50.010 DEFINITIONS. As used in this Ordinance, unless the context otherwise requires;

1. PUBLIC USE AIRPORT—means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport, Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

2. AIRPORT ELEVATIONS—The highest point of an airport's usable landing area measured in feet above mean sea level.

3. APPROACH SURFACE—A surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as the approach zone height limitation slope set forth in Section 29.50.030 of this Ordinance. In plan the perimeter of the approach surface coincides with the perimeter of the approach zone.

4. APPROACH, TRANSITIONAL, HORIZONTAL, AND CONICAL ZONES—These zones are set forth in Section 29.50.020 of this Ordinance.

5. CONICAL SURFACE—A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(6) HAZARD TO AIR NAVIGATION—An obstruction determined to have a substantial adverse effect on the safe and efficient utilization of the navigable airspace.

(7) HEIGHT—For the purpose of determining the height limits in all zones set forth in this Ordinance and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

(8) HORIZONTAL SURFACE—A horizontal plane 150 feet above the established airport elevation, the perimeter of

which in plan coincides with the perimeter of the horizontal zone.

(9) LARGER THAN UTILITY RUNWAY—A runway that is constructed for and intended to be used by propeller driven aircraft of greater than 12,500 pounds maximum gross weight and jet power aircraft.

(10) NONCONFORMING USE—Any pre-existing structure or use of land which is inconsistent with the provisions of this Ordinance or an amendment thereto.

(11) NONPRECISION INSTRUMENT RUNWAY—A runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.

(12) OBSTRUCTION—Any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030 of this Ordinance.

(13) PERSON—An individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

(14) PRECISION INSTRUMENT RUNWAY—A runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on an approved airport layout plan.

(15) PRIMARY SURFACE—A surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each end of that runway, when the runway has no specially prepared hard surface, or planned hard surface, the

primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.

(16) RUNWAY—a defined area on an airport prepared for landing and take-off of aircraft along its length.

(17) STRUCTURE—An object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

(18) TRANSITIONAL SURFACES—These surfaces extend outward at 90 degree angles to the runway centerline and the runway centerline extended at a slope of seven (7) feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at 90 degree angles to the extended runway centerline.

(19) TREE—Any object of natural growth

(20) UTILITY RUNWAY—A runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

(21) VISUAL RUNWAY—A runway intended solely for the operation of aircraft using visual approach procedures.

29.50.020 AIRPORT ZONES. In order to carry out the provisions of this Ordinance, there are hereby created and established certain zones which include all of the airspace above the height of 35 feet above the surface of the land, lying beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces as they apply to the portions

of any public use Airport lying within the jurisdiction of Clark County, Nevada. Such zones for McCarran International Airport are shown on the McCarran International Airport Airspace Zoning Map consisting of three (3) sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979, a copy of which is on file at the County Clerk's office and which is hereby incorporated by reference and made a part hereof. An area located in more than one (1) of the following zones is considered to be only in the zone with the more restrictive height limitations. The various zones are hereby established and defined as follows:

(A) *Runway Approach Zones*

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L.

The inner edge of this approach zone coincides with the width of the primary surface and is 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones—Runways O1R, 07L, 07R.

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones—Runways 19L, 25R, 25L

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet

wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface 250 feet wide. The approach zone expands outward uniformly to a width of 1,250 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 2,000 feet at a horizontal distance 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger Than Utility Visual Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide. The approach zone expands outward uniformly to a width of 1,500 feet at a horizontal distance of 5,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger Than Utility with A Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 500 feet wide.

The approach zone expands outward uniformly to a width of 3,500 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger Than Utility With A Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 4,000 feet at a horizontal distance of 10,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

f. Precision Instrument Runway Approach Zone

The inner edge of this approach zone coincides with the width of the primary surface and is 1,000 feet wide. The approach zone expands outward uniformly to a width of 16,000 feet at a horizontal distance of 50,000 feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(B) *Transition Zones*

Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each

seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) *Horizontal Zone*

The horizontal zone is the area beneath the horizontal surface and is established by swinging arcs of 5,000 feet radii for all runways designated utility or visual and 10,000 feet radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of 150 feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) *Conical Zone*

The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one (1) foot in height for every twenty (20) feet of horizontal distance outward therefore a distance of 4,000 feet. The conical zone does not include the instrument approach zones or transition zones.

29.50.030 AIRPORT ZONE HEIGHT LIMITATIONS

Except as otherwise provided in this Ordinance, no structure shall be erected, alerted, or maintained in any zone created by this Ordinance to a height in excess of the applicable height limit herein established for such zone. However, nothing in this Ordinance shall be construed as prohibiting

the construction or maintenance of any structure to a height up to 35 feet above the surface of the land in any zone created by this Ordinance. Further, no building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the Director of Aviation of Clark County shall have determined that the building or structure is so situated or marked that it would not be a hazard. All construction within the various height zones shall be subject to the property owners' signing an avigation easement. Such applicable height limitations are hereby established for each of the zones in question as follows:

(A) *Runway Approach Zones*

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01R, 07L, 07R

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones—Runway 19L, 25R, 25L.

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal dis-

tance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(2) *All other Public Use Airports*

(a) Utility Runway Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone

Slopes twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 5,000 feet along the extended runway centerline.

(d) Runway Larger than Utility With a Visibility Minimum Greater than 3/4 Mile Nonprecision Instrument Approach Zone

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a

horizontal distance of 10,000 feet along the extended runway centerline.

(e) Runway Larger than Utility With a Visibility Minimum As Low as 3/4 Mile Nonprecision Instrument Approach Zone.

Slopes thirty-four (34) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone

Slopes fifty (50) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of 10,000 feet along the extended runway centerline; thence slopes upward forty (40) feet horizontally for each foot vertically to an additional horizontal distance of 40,000 feet along the extended runway centerline.

(B) *Transition Zones*

Slope one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of 150 feet above the airport elevation. In addition to the foregoing, there are established height limits of one (1) foot vertically for each seven (7) feet horizontally beginning at the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one (1) foot for

each seven (7) feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of 5,000 feet measured at 90 degree angles to the extended runway centerline.

(C) *Horizontal Zone*

One hundred fifty (150) feet above the established Airport elevation.

(D) *Conical Zone*

One (1) foot vertical height for each twenty (20) feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of 4,000 feet to a height of 350 feet above the airport elevation.

29.50.040 USE RESTRICTIONS

Notwithstanding any other provisions of this Ordinance, no use may be made of land or water within any zone established by this Ordinance in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport.

29.50.050 NONCONFORMING USES

(A) Regulations Not Retroactive

The regulations prescribed by this Ordinance shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this Ordinance, or otherwise interfere with the continuance of a noncomforming

use. Nothing contained herein shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this Ordinance, and is diligently prosecuted.

(B) Marking and Lighting

Notwithstanding the preceding provisions of this Section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the Director of Aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction.

29.50.060 VARIANCES

(A) Future Uses

Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or other wise use his property in a manner which would constitute a violation of these regulations, may apply to the Clark County Planning Commission for a variance from these regulations. Such variances will be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code. Any such variance allowed may be subject to any reasonable conditions that the Clark County Planning Commission or Board of County Commissioners may deem necessary to effectuate the purposes of Chapter 29.66 of the Clark County Code, including, *but not limited to*, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be

necessary. If deemed proper by the Board of Clark County Commissioners, this condition may be modified to require the owner to permit Clark County, at its own expense, to install, operate, and maintain the necessary markings and lights.

(B) Existing Uses

No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this Ordinance or any amendments thereto or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed

Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than 50 percent (50%) torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 4: Enforcement and Penalties.

The penalties and enforcement provisions set forth in Chapter 29.74 of the Clark County Code shall govern the provisions of this Chapter.

SECTION 5: If any section of this Ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining portions of this Ordinance.

SECTION 6: All Ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 7: This Ordinance shall take effect and be in force from and after its passage and publication thereof by title only, together with the names of the County Commissioners voting for or against the passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED ON THE 16th DAY OF December, 1980

PROPOSED BY: Thalia Dondero

PASSED ON THE 20th DAY OF January, 1981

VOTE: AYES Robert N. Broadbent
David Canter
Manuel Cortez
Thalia Dondero
Jack R. Petitti
Richard J. Ronzone

NAYS None

ABSTAINING None

ABSENT Woodrow Wilson

BOARD OF COUNTY COMMISSIONERS
CLARK COUNTY, NEVADA

BY: /s/ Manuel Cortez
Chairman, MANUEL CORTEZ

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This Ordinance shall be in force and effect from and after the 3rd day of February, 1981.

APPROVED AS TO FORM:
ROBERT J. MILLER, DISTRICT ATTORNEY

By: /s/ Thomas R. Severns
Deputy, THOMAS R. SEVERNS

[Bracketed] material is that portion being deleted
Underlined material is that portion being added

BILL NO. 6-20-90-2

SUMMARY—An Ordinance to amend Chapter 29.50 to enlarge the area included within the regulations governing airport airspace zoning and height restrictions and to adopt new airport airspace zoning maps for McCarran International Airport, North Las Vegas Airport, Overton Airport and Jean Airport.

ORDINANCE NO. 1221
(of Clark County, Nevada)

AN ORDINANCE TO AMEND TITLE 29, CHAPTER 29.50. PUBLIC USE AIRPORT HEIGHT ZONING RESTRICTIONS BY ADOPTING SPECIFIC AIRSPACE ZONING MAPS FOR MCCARRAN INTERNATIONAL, NORTH LAS VEGAS, OVERTON AND THE JEAN AIRPORTS, TO PROVIDE THAT NOTICE MUST BE GIVEN TO THE FAA PRIOR TO CONSTRUCTION WITHIN THE PROVIDED HEIGHT STANDARDS, TO MODIFY THE LANGUAGE PROVIDING FOR VARIANCE PROCEDURES AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CLARK, STATE OF NEVADA, DOES HEREBY ORDAIN AS FOLLOWS:

29.50.010 Definitions. As used in this chapter, unless the context otherwise requires or the definition is inconsistent with a definition by the Federal Aviation Administration:

(1) "Public use airport" means any of the following airports in Clark County, Nevada: McCarran International Airport, Overton Airport, Searchlight Airport, Jean Airport, No. Las Vegas Airport, Boulder City Airport, Echo Bay Airport,

Henderson Sky Harbor Airport, Three Corners Airport, Hidden Hills Airport.

(2) "Airport elevations" mean the highest point of an airport's usable landing area measured in feet above mean sea level.

[(3) "Approach surface" means a surface longitudinally centered on the extended runway centerline, extending outward and upward from the end of the primary surface and at the same slope as approach zone height limitation slope set forth in Section 29.50.030. In plan, the perimeter of the approach surface coincides with the perimeter of the approach zone.

(4) "Approach, transitional, horizontal, and conical zones" are as set forth in Section 29.50.020.

(5) "Conical Surface" means a surface extending outward and upward from the periphery of the horizontal surface at a slope of 20:1 for a horizontal distance of four thousand feet.]

[(6)] (3) "Hazard to air navigation" means an obstruction determined to have a substantial adverse effect on the safe and efficient utilization of navigable airspace.

[(7)] (4) "Height." For the purpose of determining the height limits in all zones set forth in this chaper [sic] and/or shown on an airspace zoning map, the datum shall be mean sea level elevation unless otherwise specified.

[(8) "Horizontal surface" means a horizontal plane one hundred fifty feet above the established airport elevation, the perimeter of which in plan coincides with the perimeter of the horizontal zone.

(9) "Larger than utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of greater than twelve thousand five hundred pounds maximum gross weight and jet power aircraft.]

[(10)] (5) "Nonconforming use" means any pre-existing structure or use of land which is inconsistent with the provisions of this chapter or an amendment thereto.

[(11) "Nonprecision instrument runway" means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved or planned.]

[(12)] (6) "Obstruction" means any structure, growth, or other object, including a mobile object, which exceeds a limiting height set forth in Section 29.50.030.

[(13)] (7) "Person" means an individual, firm, partnership, corporation, company, association, joint stock association, or governmental entity; includes a trustee, a receiver, an assignee, or a similar representative of any of them.

[(14) "Precision instrument runway" means a runway having an existing instrument approach procedure utilizing an instrument landing system (ILS) or a precision approach radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated on the Official Airport Airspace Zoning Maps.

(15) "Primary surface" means a surface longitudinally centered on a runway. When the runway has a specially prepared hard surface, the primary surface extends 200 feet beyond each and of that runway, when the runway has no specially prepared hard surface or planned hard surface, the primary surface ends at each end of that runway. The width of the primary surface varies with the type of runway and its approach and is set forth in Section 29.50.020. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline.]

[(16)] (8) "Runway" means a defined area on an airport prepared for landing and takeoff of aircraft along its length.

(9) "Runway Protection Zone" (formerly "Runway Clear Zone") means a trapezoidal area at ground level, for the purpose of protecting the safety of approaches and keeping the area clear of the congregation of people.

[(18)] (10) "Structure" means an object, including a mobile object, constructed or installed by man, including but without limitation, buildings, towers, cranes, smokestacks, earth formation, signs and overhead transmission lines.

[(19) "Transitional surfaces" mean surfaces which extend outward at ninety degree angles to the runway centerline, and the runway centerline extended at a slope of seven feet horizontally for each foot vertically from the sides of the primary and approach surfaces to where they intersect the horizontal and conical surfaces. Transitional surfaces for those portions of the precision approach surfaces, which project through and beyond the limits of the conical surface, extend a distance of five thousand feet measured horizontally from the edge of the approach surface and at ninety degree angles to the extended runway centerline.]

[(20)] (11) "Tree" means any object of natural growth.

[(21) "Utility runway" means a runway that is constructed for and intended to be used by propeller driven aircraft of twelve thousand five hundred pounds maximum gross weight and less.

(22) "Visual runway" means a runway intended solely for the operation of aircraft using visual approach procedures. (Ord. 728 & 3 (part), 1981)]

29.50.020 Airport zones. In order to carry out the provisions of this chapter, there are created and established certain zones which include all of the airspace above the height of thirty-five feet above the surface of the land, lying

beneath the approach surfaces, transitional surfaces, horizontal surfaces, and conical surfaces, as they apply to the portions of any public use airport lying within the jurisdiction of Clark County, Nevada. Such zones for [McCarran International Airport] each public use airport are shown on the [McCarran International] Official Airport Airspace Zoning Map [consisting of three sheets, prepared by the Clark County Airport Engineering Department dated September 10, 1979,] for each public use airport as adopted by specific map as put forth in §29.50.050. [a copy of which is on file at the county clerk's office and which is hereby incorporated by reference and made a part hereof.] An area located in more than one of the [following] airport zones is considered to be only in the zone with the more restrictve height limitations.

[(A) Runway Approach Zones.

(1) McCarran International Airport

(a) Utility Runway Visual Approach Zone Runways 19R, 01L. The inner edge of this approach zone coincides with the width of the primary surface and is two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01L, 07L, 07R. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Precision Instrument Runway Approach Zones Runways 19L, 25R, 25L. The inner edge of this approach zone coincides with the width of the primary surface and is

one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(2) All Other Public Use Airports

(a) Utility Runway Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface two hundred fifty feet wide. The approach zone expands outward uniformly to a width of one thousand two hundred fifty feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(b) Utility Runway Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of two thousand feet at a horizontal distance five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(c) Runway Larger than Utility Visual Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of one thousand five hundred feet at a horizontal distance of five thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(d) Runway Larger than Utility with a Visibility minimum Greater than Three-fourths Mile Nonprecision Instrument approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is five hundred feet wide. The approach zone expands outward uniformly to a width of three thousand five hundred feet at a horizontal distance of ten thousand feet from the primary surface. Its centerline is the continuation of the centerline of the runway.

(e) Runway Larger than Utility with a Visibility Minimum as Low as Three-fourths Mile Nonprecision Instrument Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of four thousand feet at a horizontal distance of ten thousand from the primary surface. Its centerline is the continuation of the centerline of the runway.

(f) Precision Instrument Runway Approach Zone. The inner edge of this approach zone coincides with the width of the primary surface and is one thousand feet wide. The approach zone expands outward uniformly to a width of sixteen thousand feet at a horizontal distance of fifty thousand feet from the primary surface. It centerline is the continuation of the centerline of the runway.

(B) Transition Zones. Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one foot vertically for each seven feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symmetrically with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one foot vertically for each seven feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of five thousand feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

(C) Horizontal Zone. The horizontal zone is the area beneath the horizontal surface and is established by swinging

arcs of five thousand feet radii for all runways designated utility or visual and ten thousand feed [sic] radii for all others from the center of each end of the primary surface of each runway and connecting the adjacent arcs by drawing lines tangent to those arcs. The horizontal surface is located at a height of one hundred fifty feet above the established airport elevation. The horizontal zone does not include the approach zones or transition zones.

(D) Conical Zone. The conical zone lies beneath the conical surface established as the area commencing at the periphery of the horizontal zone and extending upward one foot in height for every twenty feet of horizontal distance outward therefore for a distance of four thousand feet to a height of three hundred and fifty (350) feet above the airport elevation. The conical zone does not include the instrument approach zones or transition zones. (Ord. 728 & 3 (part), 1980)]

29.50.030 Airport zone height limitations. (A) Except as otherwise provided in this chapter, no structure shall be erected, [alerted] altered, or maintained in any airport zone [created by this chapter to a height] that would violate the height limitations depicted in the maps adopted herewith [in excess of the applicable height limit established in this chapter for such zones]. However, nothing in this chapter shall be construed as prohibiting the construction or maintenance of any structure to a height up to thirty-five feet above the surface of the land in any zone created by this chapter. [Further, no Building or structure shall be erected within the zones unless the Federal Aviation Administration (FAA) of the United States of America and the director of aviation of the county shall have determined that the building or structure is so situated or marked that it would not be a hazard] Any building or structure constructed within the zones shall be situated or marked as approved by the Federal Aviation Administration and the Clark County Department of Aviation so that it does not constitute a hazard as defined

in Section 29.50.010(3). All construction within the various height zones shall be subject to the property owner's signing an avigation easement. [Such applicable height limitations are established for each of the zones in question as follows:

(A) Runway Approach Zones.

(1) McCarran International Airport.

(a) Utility Runway Visual Approach Zone—Runways 19R, 01L. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Runway Larger than Utility Visual Approach Zones—Runways 01R, 07L, 07R. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Precision Instrument Runway Approach Zones Runway 19L, 25R, 25L. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forty thousand feet along the extended runway centerline.

(2) All Other Public Use Airports.

(a) Utility Runway visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(b) Utility Runway Nonprecision Instrument approach Zone. Slopes twenty feet outward for each foot

upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(c) Runway Larger than Utility Visual Approach Zone. Slopes twenty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of five thousand feet along the extended runway centerline.

(d) Runway Larger than Utility with a visibility Minimum Greater than Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(e) Runway Larger than Utility with a Visibility Minimum As Low as Three-fourths Mile Nonprecision Instrument Approach Zone. Slopes thirty-four feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline.

(f) Precision Instrument Runway Approach Zone. Slopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline; thence slopes upward forty feet horizontally for each foot vertically to an additional horizontal distance of forth [sic] thousand feet along the extended runway centerline.

(B) Transition Zones. Slopes one foot vertically for each seven feet horizontally beginning at the sides of and at the same elevation as the primary surface and approach surface, and extending to a height of one hundred fifty feet above the airport elevation. In addition to the foregoing, there are extablished [sic] height limits of one foot vertically for each

seven feet horizontally beginning a [sic] the sides of and the same elevation as all approach zone surfaces for the entire length of all approach zone surfaces and extending upward and outward to the points where they intersect the horizontal and conical surfaces. Where the precision instrument runway approach zone projects beyond the conical zone surface, a height limit of one foot for each seven feet of horizontal distance shall be maintained beginning at the sides of and the same elevation as the approach surface, and extending a horizontal distance of five thousand feet measured at ninety degree angles to the extended runway centerline.

(C) Horizontal Zone. One hundred fifty feet above the established airport elevation.

(D) Conical Zone. One foot vertical height for each twenty feet of horizontal distance beginning at the periphery of the horizontal zone and extending a horizontal distance of four thousand feet to a height of three hundred fifty feet above the airport elevation. (Ord. 728 &3 (part), 1980)]

29.50.040 Notices of Construction or Alteration.

(A) Any person proposing construction or alteration in the environs of any public use airport or airport operated by the United States Armed Services shall notify the Chief, Air Traffic Division, FAA Regional Office having jurisdiction over the area within which the construction or alteration will be located not less than thirty days before the commencement of the construction or alteration if such construction or alteration exceeds any of the following height standards:

(1) Two hundred (200) feet above the ground level at its site.

(2) The plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway of any airport subject to the provisions of this chapter.

(3) For highways, railroads and other traverse ways for mobile objects; if construction or alteration is of greater height than the standards set forth in subparagraphs (1) or (2) hereinbefore after their height has been adjusted upward for the appropriate traverse way as follows:

(a) For interstate highways: 17 feet

(b) For any other public roadways: 15 feet

(c) For any private road: 10 feet or the height of the highest mobile object that would normally traverse the road, whichever is greater.

(d) For any railroad: 23 feet

(e) For a waterway or any otherunspecified [sic] traverse way: the height of the highest mobile object that would normally use the traverse way.

(4) When requested by the FAA, any construction or alteration that would be in an instrument approach area and available information indicates the height might exceed any FAA obstruction standard.

Any notice required by this section shall be on FAA Form 7460-1, available from the regional offices of the Federal Aviation Administration.

(B) Construction or Alteration not requiring notice. Notice to the FAA is not required for construction or alteration of any of the following:

(1) Any object that would be shielded by existing structures of a permanent and substantial character or by natural terrain or topographical features of equal or greater height, and would be located in the congested area of a city, town, or settlement where it is evident beyond all reasonable doubt that the structure so shielded will not adversely affect safety in air navigation.

(2) Any antenna structure of 20 feet or less in height except one that would increase the height of another antenna structure.

(3) Any air navigation facility, airport visual approach or landing aid, aircraft arresting device, or meteorological device, of a type approved by the Administrator, or an appropriate military service on military airports, the location and height of which is fixed by its functional purpose.

(4) Any construction or alteration for which notice is required by any other FAA regulation.

29.50.050 Official Airport Airspace Zoning Maps. The following official airport airspace zoning maps for specific public use airports lying within the jurisdiction of Clark County, Nevada, as adopted by ordinance of The Board of Clark County Commissioners, are on file at the office of the County Clerk and hereby incorporated by reference and made a part hereof:

(A) The McCarran International Airport Official Airspace Zoning Map, consisting of five (5) sheets,prepared [sic] by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(B) The North Las Vegas Air Terminal Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(C) The Overton Airport Official Airspace Zoning Map, consisting of one (1) sheet, prepared by the Clark County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

(D) The Jean Airport Official Airspace Zoning Map consisting of one (1) sheet, prepared by the Clark

County Airport Engineering Department dated July 18, 1990 and adopted by Ordinance Number 1221.

29.50.060 Use restrictions. Notwithstanding any other provisions of this chapter, no use may be made of land or water within any zone established by this chapter in such a manner as to create electrical interference with navigation signals or radio communication between the airport and aircraft, make it difficult for pilots to distinguish between airport lights and others, result in glare in the eyes of pilots using the airport, impair visibility in the vicinity of the airport, create bird strike hazards, or otherwise in any way endanger or interfere with the landing, takeoff, or maneuvering of aircraft intending to use the airport. (Ord. 728 & 3 (part), 1980)

29.50.070 Nonconforming uses. (A) Regulations Not Retroactive. The regulations prescribed by this chapter shall not be construed to require the removal, lowering, or other change or alteration of any structure not conforming to the regulations as of the effective date of this chapter, or otherwise interfere with the continuance of a nonconforming use. Nothing contained in this chapter shall require any change in the construction, alteration, or intended use of any structure, the construction or alteration of which was begun prior to the effective date of this chapter, and is diligently prosecuted.

(B) Marking and Lighting. Notwithstanding the preceding provisions of this section, the owner of any existing nonconforming structure may be required to install, operate, and maintain thereon such markers and lights as may be deemed necessary by the director of aviation to indicate to the operators of aircraft in the vicinity of the airport the presence of such airport obstruction. (Ord. 728 & 3 (part), 1980)

29.50.080 Variances. (A) Future Uses. Any person desiring to erect or increase the height of any structure, or to permit the growth of any tree, or otherwise use his property in a manner which would constitute a violation of these regu-

lations, may apply to the county planning commission for a variance from these regulations. Such variances [will] may be allowed where a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations [and of Chapter 29.66]. Any such variance allowed may be subject to any reasonable conditions that the county planning commission or board of county commissioners may deem necessary to effectuate the purposes of [Chapter 29.66,] Title 29 including, but not limited to, the condition to require the owner of the structure or tree in question to install, operate, and maintain, at the owner's expense, such markings and lights as may be necessary. If deemed proper by the board of county commissioners, this condition may be modified to require the owner to permit the county, at its own expense, to install, operate, and maintain the necessary markings and lights. Variances pursuant to this chapter shall be considered under the procedures put forth under Section 29.66 of this title with the exception that the applicant shall notify the FAA Regional Office of the application prior to the time of submission of the variance application and that the Planning Commissions' action concerning the variance application shall be considered advisory only, with all variances being referred to the Board of County Commissioners for final disposition.

(B) Existing Uses. No permit shall be granted that would allow the establishment or creation of an obstruction or permit a nonconforming use, structure, or tree to become a greater hazard to air navigation than it was on the effective date of this chapter or any amendments thereto, or than it is when application for a permit is made.

(C) Nonconforming Uses Abandoned or Destroyed. Whenever a nonconforming structure, as set forth in the provisions of Chapter 29.45, has been abandoned or more than fifty per-

cent torn down, physically deteriorated, or decayed, no permit shall be granted that would allow such structure to exceed the applicable height limit or otherwise deviate from the zoning regulations.

SECTION 2. If any section of this ordinance or portion thereof is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such holding shall not invalidate the remaining parts of this ordinance.

SECTION 3. All ordinances, parts of ordinances, chapters, sections, subsections, clauses, phrases or sentences contained in the Clark County Code in conflict herewith are hereby repealed.

SECTION 4. This ordinance shall take effect and be in force from and after its passage and the publication thereof by title only, together with the names of the County Commissioners voting for or against its passage, in a newspaper published in and having a general circulation in Clark County, Nevada, at least once a week for a period of two (2) weeks.

PROPOSED on the 20th day of June, 1990.

PROPOSED BY Manuel J. Cortez &
William U. Pearson

PASSED on the 18th day of July, 1990.

VOTE:

AYES: Jay Bingham
Paul J. Christensen
Manuel J. Cortez
Thalia M. Dondero
Karen Hayes

NAYS: None

ABSTAINING: None

ABSENT: William U. Pearson
Bruce L. Woodbury

BOARD OF COUNTY
COMMISSIONERS
CLARK COUNTY, NEVADA

By /s/ Bruce L. Woodbury
Chairman

ATTEST:

/s/ Loretta Bowman
LORETTA BOWMAN, County Clerk

This ordinance shall be in force and effect from and after the 1st day of August, 1990.